Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]	[redacted]	[redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
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which is in terms restricted to public nuisances in fact.—**Advocate-General v. Hajee Ismail Hasham**, 12 Bom L R 274= 5 Ind Cas 213.

C P C (1908) S. 92.

Notes:—This section corresponds with the first part of section 539 of Act XIV of 1882. The following changes have been introduced in this section: (1) the words "High Court" have been omitted; (2) clauses (*a*) and (*d*) have been newly added and clause (*e*), which corresponds with clause (*c*) of the old Act, has been made more clear by substitution of the words, *what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust*, for the words " the proportions in which its objects are entitled ".

Another important change has been introduced in this section by inserting the words " *or in any other Court empowered in that behalf by the Local Government &c.*" By the above change any other Subordinate Court will be competent to try suits under this section, when specially empowered by the Local Government.

"The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply the *Cypres* doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (Mayor of Lyons' Case, L R 3 I A 32) and we do not think it necessary to make express reference to it.

It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of the public charities should be made more extensive. The clause, as it stands, gives sufficient powers to Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount: that no accounts of their expenditure are ordinarily rendered, and that there is good ground for believing that a considerable portion is misspent or squandered on useless objects".—*See the Reports of the Specia mmittee.*

C P C (1908) S.92=(1882 S. 539)-*Contd.*

On the above grounds the Legislature was asked to insert a clause empowering any two or more persons having the like interest and having obtained the like consent to apply to the Court for directing any trustee of charity to file in Court a detailed account of the receipts and disbursements in connection with the trust property. But the clause was not inserted on the ground that public opinion of the communities interested should first be obtained.

C P C S. 92 (1908)=S. 539 (1882).

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C P C Ss. 92, 93=(1882) s. 539.

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See (1) Endowment.
(2) Right of Suit—Charities.
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1 SCOPE OF THE SECTION.

(1) Applicability.

1129—C P C S. 92 (1908)=S. 539 of 1882.

Applicability.—**Religious Endowments.**
9 Ind Cas 168.

(2) Applicability-Suit for declaration that property is endowed property.

1130—Ss. 92, 93=(1882 S. 539).

S. 539 C P C., pre-supposes the existence of a trust for the administration of which it is necessary to make provision. That section cannot apply to a suit in which the object of the plaintiff is to obtain a declaration that certain property is endowed property, the fact of the endowment being denied on the other side. **Jamaluddin v Mujtaba Husain. 1903 A W N 120= 25 All 631.**

(3) Suit for appointment of new trustees—Specific Relief Act S. 42.

1131—Ss. 92, 93=(1882 S. 539 (A).

A suit for appointment of new trustees on the ground that the defendants are not the lawful trustees is one falling within Cl (a) of S. 539, and is maintainable without a prayer for possession. (L R 15 I A 10 fol.) **Neti Ram Jogiah v Yenkatacharlu. 26 Mad 450.**

Notes—Dist: 33 Cal 789=10 C W N 581. Ref: 19 M L J 772.

(4) Meaning of the expression "trust created for public charitable purposes.

1132—1133—C P C Ss. 92, 93=S. 539—Trust for public charitable purposes—Bequest of money "*bama sarif indulla*"—Muhammadan Law as used in section 539 of the C P C discussed.

Held, that a bequest of money by a Muhammadan testator "*bama sarif indulla*," *i. e.*, to be expended on pious purposes at the discretion of the executor, is too vague and indefinite to be pronounced a bequest creating a "trust for public charitable purposes" within the meaning of the above section, upon any interpretation that could properly be put upon the language of that section. The fund bequeathed in the above terms might, according to the view of the Muhammadan lawyers, be legitimately expended upon a variety of purposes, which include, among others, pilgrimage to Mecca, almsgiving, fasting, prayer, purification, and the erection of masjids, the particular objects on which the expenditure is to be made lying within the discretion of the executor. **Deputy Commissioner of Delhi v Mussammat Muhamdi Jan. 50 P R of 1882.**

(5) Religious charitable trusts—Further or other relief—Construction of 'esujdem generis'.

1134—C P C S. 92 (539).—Public charties.

Per *Davar* J.—A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within S. 539 of C P C, 1882. S. 539 contemplates a suit either in the name of the Advocate-General at the instance of relators or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The 'interest' of the parties here contemplated must be the 'interest' that is threatened or infringed. A well established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community. —*Held* by *Beaman* J.—The decision of a suit under S. 539 of C P C, 1882, is not only binding on the parties to it, but on all persons affected by it. The expression "such further or other relief' in the section means such further or other relief as from the nature of the introductory words and the exemplificatory clauses, appears to the Court to be appropriate in such a suit, e g removing fraudulent trustees, restraining a breach of trust, and so forth. Any extension or limitation of the scope of a trust, so as to exclude those who are intended to be included or to include those who were intended to be excluded is a breach of trust. **Sir Dinshaw M Petit v Sir Jamsetji Jijibhai. 11 Bom L R 85= 5 M L T 301=33 Bom 509=2 Ind Cas 701.**

(6) Trust property, suit against dismissed -Mahant by his successor for possession of.

1135—C P C—Ss. 92, 93=S. 539 of 1882.

The plaintiff sued as the *Mahant* or trustee of an endowment, in whom the property of the endowment was vested for the recovery of that property from the late *Mahant* who according to the plaint, was in possession of the property as a trespasser, and another defendant

(1) Scope of the section-*Contd.*

who was in possession of a portion of the said property that had been alienated to him by the late *Mahant*. *Held*, that the suit was not barred by the provisions of s. 539, Civil Procedure Code, and was maintainable against the late *Mahant* as well as against the other defendant. The fact that the suit involved the determination of the questions whether the late *Mahant* had been removed from the *Mahantship*, whether such removal was validly effected, whether the plaintiff was appointed *Mahant* in succession to him, and whether such appointment was valid, was immaterial.

Damodar Das v Narsing Das. **3 O C 299.**

(7) Suit to remove mahant on account of misfeasance—Receiver, Court's power to appoint when right of succession not in dispute.

1136—C P C—(1908) S. 92=(1882) S. 539.

In a suit brought under the Religious Endowments Act, a Civil Court has no power to appoint a receiver or manger of *debutter* property except under S. 5 of the same Act. A Civil Court has a power under that Section to appoint a manager only when there is a dispute as to the right of succession. A person electing to proceed under the Religinus Endowments Act can be given only such special relief as that special statute says it may give. If he wishes for any relief beyond that, he should proceed under S. 539, C P C.

Gyanananda Asram v Kristo Chandra Mukerjee. **8 C W N 404.**

(8) Religious endowment—Suit to recover possession of shrine—Right of sewaks or worshippers to remove a mahant.

1137—C P C—S. 92 (1908)=S. 539 (1882).

Onus probandi–In a suit by a person claiming as the lawful *Mahant* of a shrine for the recovery of possession thereof and of the lands attached thereto, defendant who had been elected *Mahant* by the worshippers of the shrine, pleaded, *inter alia*, that Section 539 of the Code barred the suit.

Held, that Section 539 had no application to such a suit,— that section deals with two classes of cases-(i) where there is an alleged breach of any trust created for public charitable or religious purposes, and (ii) where the direction of the Court is necessary for the administration of any such trust.

(1) Scope of the section-*Contd.*

On the facts of the case *held*, that the defendant on whom the *onus* lay had failed to prove (i) that by general or special custom the worshippers of a shrine were competent to remove a *Mahant* and to appoint his successor; and (ii) that the plaintiff had acquiesced in his removal. **Bawa Sukhram Das v Barhampuri. 122 P R., 1890.**

Notes:—Ref: 78 P. R. 1907, 53 P. R. 1904, 7 P. R. 1908 Note. Fol. 7 P. R. 1908.

(9) To recover possession of property from an outsider is not within S. 539.

1138—C P C—Ss. 92, 93 (1908)=S. 539 (1882).

A suit to recover possession of property from an outsider is not within sec. 539. **Sitaram v Lakhmidasji.** **1892, P J., 142.**

(10) Power to appoint a new trustee C P C S. 539.

1139—C P C—S. 92 (1908)=S. 539 of 1882.

S. 14 of the Religious Endowments Act only empowers a Court to direct the specific performance of any act by the trustee, manager or superintendent, or award damages or costs against such trustee, manger or superintendent, and to direct their removal. It confers no power on the Court to appoint a new trustee, manager or superintendent, for which the proceedings provided for by S. 539 of the Code of Civil Procedure must be resorted to. **Sadasankar v Hari Shankar.**

5 A L J 191; 1908 A W N 101.

(11) Breach of trust—Purchaser—Shebait powers of—Decree under S. 539, Scope of.

1140—C P C Ss. 92 and 93=(1882) S.539 – Interest—Trustee—Limitation Act (XV of 18877) Sch 11, Arts. 134, 144.

In a suit under Sec. 539 C P C where one of the plaintiffs was the *shebait* of a puplic religious and charitable trust, it was competent to the Court to grant to the plaintiffs for the benefit of the *cestui que trust*, a decree for the cancellation of unauthorised and invalid leases of the trust property executed by the *shebait* and his predecessor and for recovery of possession by the existing *shebait*.

Persons who are *ex-officio* concerned in the performance of the worship of a public idol and are entitled to maintenance from the temple funds

C P C (1908) S. 92=(1882,) S.539 *Contd*

(1) Scope of the section—*Contd.*

have an interest in the trust within the meaning of Sec. 539 C P C and are competent to maintain an action under that section.

Where X and Y instituted under sec.539, with the consent of the Advocate—General, a suit for setting aside certain improper alienation of *debutter* property and for other relief making A, the then *shebait*, a party defendant, and subsequently, A was transferred to the category of plaintiff under sec.32 C P C., the suit was maintainable at the instance of A without any fresh sanction of the Advocate-General. It was not necessary for A to verify the plaint.

When a person has taken trust property from a trustee with full knowledge that it is property which the alienor was not competent to deal with, neither the trustee nor his successor is estopped from recovering the trust property for the benefit of the *cestui quetrust*.

Where, however, there was an alleged trust which the trustees themselves were competent to terminate and the trustees after having alienated the property sought to recover it for their own benefit, they would be barred by the doctrine of estoppel.

A *shebait* has no more power to deal with *debutter* property than has the manager of an infant's estate and *prima facie* any permanent alienation made by him is bad in law and a breach of trust; but where necessity is established, a *shebait* can make such disposition or alienation as a prudent manager may for the benefit of the estate.

Ram Churn Tewary v Protap Chandra Dutt Jha **2 C L J 448.**

Notes.—Dist: 2 C L J 646; 33 Cal 511=10 C W N 738; 8 C L J 306. Ex: 3 C L J 460. Ref: 30 P. R. 1908=35 P W R 1908. 102 P L R 1908=35 P W R 1908=30 P. R. 1908 F. B.

(12) Trust—suit

1141.—C P C Ss 92, 93=(1882 s. 539.)—A suit instituted for the vindication of the right of management which is vested in and actually being exercised by the plaintiffs and those they represent at the date of obstruction, does not fall within S. 539, C P C merely because those who cause the obstruction happen to have been nominated as trustees. **Navroji v Kharsedji** **5 Bom L R 745=28 Bom 90.**

C.P C.(1908)-S.92=(1882,S 539)-*Contd.*

(1) Scope of the section-*Concld.*

(13) To appoint a trustee and to recover trust properties—Joinder of parties.

1142.—C P C S 92, O I, rr 3 & 4, O 11 rr 2 & 3.—Suit to appoint a trustee and to recover trust properties—Joinder of parties—Stranger to trust, whether can be joined as party—Widow and heir of trustee—Trust. **4 L B R 183.**

(14) Decree directing performance of puja and giving of honors according to usage—Nature of the decree—Whether executable

1143.—C P C Ss 92, 93: O 21 rr 10, 21 S 48 =(1882 Ss 539 and 230)—Religious Institution.

Where in a suit against the trustees of a religious institution the decree directed among other things the performance of puja and the giving of honours etc. according to the usage of the institution.

Held that this portion of the decree must be regarded merely as declaratory and is incapable of execution by the Civil Courts, though in a suit properly framed for the purpose the trustee may be removed from this offence if he failed to do his duty with regard to this matter. (5 Bom 80: 3 M I A 359 followed 18 Cal 448 P C Referred to.) **Janakirama Reddi v Thiruyenkada Ramunuja Chari 2 M L T 94**

2. ADVOCATE GENERAL'S SANCTION

(1) Whether obligatory.

1144.—C P C S 92 (1908)=S 539 of 1882. Whether obligatory—Difference in new Code. **5 S L R 134.**

(2) Sanction—Condition precedent.

1145.—C P C Ss 92, 93=(1882 s. 539)

The "consent in writing" of the Advocate General or other officer appointed by the Local Government must be a specific permission given to two or more persons by name. A permission given to one applicant by name "and another" is not a sufficient compliance with the terms of the section. *Held* also that the consent is a condition precedent to the institution of the suit (10 Mad 185 dissented from 45 Ch D 139 distinguished.) **Gopal Dei v Kanno Dei.** **1903 A W N 227=26 All 162.**

Notes.—Ref: 34 Cal 505; 5 C L J 270.

(3) No permission for the institution of suit—Misappropriation by mutwalli—Suit to set aside.

1146.—C P C Ss 92, 93 [1908]=S. 539 of 1882.

The plaintiffs brought their suit on the allegations that they were Muhammadans interested in the due carrying out of the provisions of a certain deed of endowment made by a deceased ancestor of theirs; that one of the defendants was the *mutwalli* of the property made *wakf* under the said deed, and that he had mortgaged the wakf property to the other defendant who was seeking to bring it to sale by enforcement of his mortgage. The plaintiffs prayed for a declaration that the property in suit was wakf and in consequence not liable to be brought to sale under a decree obtained by the defendant mortgagee. *Held* that the suit came within the provisions of s 539 of the Code of Civil Procedure, and that, no permission, as required by that section, having been obtained for its institution, the suit must fail. **Hasmat Bibi v Muhammad Askari.** **15 W N 2.**

(4) Suit by persons authorized under a will—No consent obtained, effect of.

1147—C P C Ss 92,93=(1882 section 539).

Persons authorised under the terms of a will to remove the manager of an endowment in case of mismanagement,can maintain a suit to remove the manager, without the consent of the Advocate-General (10 C W N 581 Ref.) **Ram Das v Badri Narain.** **3 A L J 773= =1906 A W N 260=29 All 27.**

(5) Consent of Advocate General—Relating to charity—Amendment of plaint—substitution of another plaintiff with the consent of the Advocate—General

1148.—C P C Ss 92, 93=(1882 s 539.)

A suit under S 539 of the Civil Procedure Code was in the first instance brought by one person with consent of the Advocate-General. This was objected to, and it led to an amendment of the plaint by the addition of the second plaintiff, with the certificate of the Advocate General which ran " I give my consent to the amendment of the plaint of this suit as proposed."

Held, that the suit as brought is defective in a material particular; for S 539 of the Civil Procedure Code nowhere speaks of the consent of the Advocate General to an amendment of the plaint, and it would be unduly forcing the words of the Code to hold that by virtue of the second consent given by the Advocate General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the consent in writing of the Advocate General. **Darves v Jainudin 8 Bom L R751. =30 Bom 603.**

(6) Suit for removal of Mahant of Dharmsala—Sanction of Collector.

1149.—C P C Ss 92, 93=(1882 S 530). *Held* in a suit for removal of Mahant of Dharmashala, sanction of Collectors is necessary and in its absence suit is not maintainable. 78 P R 1907=193 P L 1908 and 7 P R 1908=176 P L R 1908, Fol; 74 P R 1885 and 29 P R 1897, cited; 33 Bom 509 and 30 Cal 789 Ref. **Sahab Singh v Phuman 198 P L R 1910=8 Ind Cas 528**

(7) Public trusts—Sanction of the Advocate—General—Mandatory or permissive—Its scope.

1150—C P C Ss. 92 and 93 (=s. 539 Civ. Pro Code, 1882)—Religious Endowments Act (XX of 1863), s. 14—Demurrer.

To bring a case within the purview of s. 539, the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive public trust, upon a cause of action alleging a breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trustee be so *de jure* or *de son tort* and for the particular relief mentioned. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. As against strangers, such as alienees from the trustee and mere trespassers holding adversely to the trust, the section does not apply. Meaning of the phrases "direction of the Court is necessary for the administration" and "such further or other relief" in s. 539 explained. S. 539 is not mandatory but enabling and permissive : cumulative and not restrictive in its effect and does not affect any right of suit which may exist independently of it. If, therefore,a suit is one which would have been maintainable prior to the enactment of the corresponding

C P C (1908) S.92=(1882, S.539)-*Contd*

(2) Advocate General's sanction—*Concld.*

section in the Code of 1877, it may now be instituted independently of the provisions of s. 539, even though it be upon such a cause of action and for such relief as is mentioned in it. Scope and history of the section discussed and explained. **Rai Budreedas Mukim Bahadur v Chuni Lal Johurry. 10 C W N 581=33 Cal 789.**

Notes:—Expl: 32 Mad 131=4 M L T 315; Ref: 1 S L R 155, 29 All 27=3 A L J 773=A W N 1906, 260, 33 Cal 905=10 C W N 867, 4 L B R 183, 7 M L T 45.

(8) Whether directory—Sanction of Advocate—General—Pre-existing right of suit whether taken away—Jurisdiction point whether can be waived.

1151—C P C Ss. 92, 93,=[1882 s. 539].

A pre-existing right of suit cannot be held to be taken away by the words of s 539 it being permissive and not mandatory.

A Hindu interested in a public place of worship can bring a suit without a certificate of the Advocate-General under s. 539.

The question as to the certificate may be raised in second appeal, though waived in the lower Courts. **Mussamat Radhibai, wife of Kishendas v Mr Kundamal Sd Diwan Asumal. 1 Sind L R 155.**

(9) Sanction of the Advocate—General when necessary under s. 539.

1151A.—C P C (1908) Ss. 92,93 = S 539-Public **trust.**

S. 539 of the Civil Procedure Code contemplates the existence of a dispute of such a *public nature* that the intervention of the Advocate-General is necessary to decide it and by whom a suit should be brought to establish public rights 24 Cal 418, 425 ref to. **Monijan Bibee v Khadem Hossein. 9 C W N 151=32 Cal 273.**

Notes:—Fol: 33 Cal 789=10 C W N 581.

3 RELATOR'S RIGHTS.

(1) Relators cannot appeal in their own right.

1152—C P C Sec. 92, 93=(1882 S. 539.)

Where a suit filed, under S. 539 of the Civil Procedure Code, by the Advocate—General at the instance of relators, is dismissed and the Advocate—General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account, against the dismissal. **Jan Mahomed v Syed Nurudin. 9 Bom L R 996=32 Bom 155.**

C P C (1908) S.92=(1882, S 539)-*Contd.*

(3) Relator's rights—*Concld*

(2) Dharmsala—Right of worshippers at, to contest alienation of property attached to—Application of s. 539 C P C.

1153—C P C Ss. 92, 93=S. 539 of 1882.

The plaintiffs were worshippers at a *dharmsala* and interested in the maintenance of the institution and preservation of the property intact.

Held, that in this capacity they had a *locus standi* to challenge certain alienations of property alleged and found to be wakf and attached to the *dharmsala*, not as self-constituted representative of the body of worshippers, who should have obtained an order under Section 30, Civil Procedure Code, but as persons themselves interested in the preservation of the property.

Held, further, that Section 539, Civil Procedure Code, has no application to a suit of this description. **Sewa Singh v Budh Singh. 66 P R 1892.**

Notes:—9 P R 1904, 78 P R 1907.

4 SCHEMES FOR MANAGEMENT, SUITS FOR.

(1) Religious endowment—-Scheme for management.

1154—C P C Ss. 92, 93=(1882 s. 539).

In settling a scheme of management under S. 539 of the Civil Procedure Code, due consideration should be given to the established practice of the institution and to the position of the persons connected with it. (12 Bom 247 (P C) Fol:) **Baldevpuri v Gopaldas. [illegible] Bom L R 756.**

(2) Hindu Temple—Suit to settle a scheme —Scheme by the District Court and amended by the High Court.

1155—C P C Ss. 92, 93=(1882 Sec 539)—Appeal to the Privy Council—Directions.

The plaintiffs brought a suit under section 539 of the Code of Civil Procedure for the settlement of a scheme for the better management of the Hindu Temple at Tirupati,

C P C (1908) S.92=(1882 S.539)-*Contd.*

(4) Schemes for management, suits for-*Contd*

The District Court settled a scheme which was amended by the High Court.

On appeal to the Privy Council their Lordships discharged the orders of the High Court and the District Court, and settled a scheme providing for the appointment of a treasurer and for the due and proper application of the temple funds so as to meet the exigencies of the case without impairing the authority of the Mahant as the duly constituted manager of the institution. **Prayaga Doss Jee Yaru v Tirumala Anandam Pillai P C.** **2 M L T 119= 11 C W N 442 P C=17 M L J 236= 30 Mad 138=9 Bom L R 588.**

(5) Scheme—Alteration of—Trusteeship vested in head of a mutt—Controlling authority—Additional trustee, jurisdiction of Court to appoint—Cypres.

1156—C P C Ss. 92, 93,=(1882 S. 539).

Where a prior arrangement made for the administration of a public religious institution has not effected the desired object (viz., the better administration of the trust) and where successive trustees have been proved to have been incompetent in the discharge of the duties of their office and to have misappropriated the surplus trust funds, there is a proper case for the Court to sanction a scheme. It is competent for the Court to appoint new, or additional trustees in the case of a temple when the office of trustee vests in that of the head of a mutt for the time being. It is also competent for the Court to appoint a controlling authority over such trustee. The expression "appointment of new trustees *under the trust*" in S. 539, C P C does not mean in conformity only with the original constitution of the trust or with the rule in force in respect to it at the time of suit. The High Court and the District Court in this country to which the jurisdiction is confirmed under S. 539 C. P. C. possess practically the same unlimited jurisdiction as the Courts of Chancery in matters relating to the administration of public charities. Where the Government in withdrawing their control and management of religious institutions made provision for the due administrations of the same, such provision was analogous to a scheme and could be altered on good case being shown by any authority legally competent so to alter or modify it. Where the original rules of the country were directly in management of a religious institution and the East India Company, and afterwards the Board of Revenue were managing the same and the Government when ceasing their connection handed over the management to a mahant the latter is not a trustee deriving his power of management under the original constitution as framed by the founder. A scheme for the due administration of the Tirupati temple framed and the surplus-funds applied *cypres.* **Prayag Doss Ji v Sriranga Charlu Varu.** **15 M L J 133= 28 Mad 319**

Acc No
Dated 17.7.70

5 JURISDICTION.

(1) Scope of suit—Jurisdiction of District Judge—Recovery of trust property alienated—Court-fees.

1157—C. P. C. Ss. 92. 93=(1882 S. 539).

There is no good reason for holding that, under the section, the Court cannot determine of what the trust-properties consisted or find that particular alientions of them could not be maintained, provided all proper parties are represented before it.

Semble, if transferees, or mortgagees who have been impleaded in a suit instituted under S 539, do not accept the findings of the Court in that suit, it may be necessary for the trustee appointed by the Court to manage the trust property; to institute a suit for recovery of possession.

Semble (Per Stanley, C. J.)-A suit for the dismissal of a trustee and for recovery of trust property from the hands of a third party, to whom the same had been improperly alienated fell within the scope of S. 539 (24 Cal 418 Appr.).

A suit instituted under S. 539, is not a suit in which plaintiffs claim or can claim for themselves, possession of the trust-property. They merely ask the Court to vest the trust-property in the trustees duly appointed to manage the trust and to take it out of the hands of trustees, who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power, under the section, to vest the trust property in the new trustees, and it seems to be reasonably clear that the Court may direct a trustee, who is being removed, to make over the trust-property to the new trustees. The plaintiffs in such a suit carry on the suit for the benefit of all persons interested in the trust and continue to act as plaintiffs until the decree has been fully executed. As regards the Court-fees, in many cases, the costs of such a suit as this fall on the trust estate, and that, as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose on the trust estate the payment of the ordinary Court-fee payable in respect of a hostile suit for recovery of land on title.

Per Burkitt, J.—By S. 539, the Legislature do not create a new class of civil rights nor constitute a Court empowered to hear suits relating to infringements of those rights. Were it not for S. 539, the class of suits, which the section makes triable by the District Judge only, would be cognizable by the ordinary Subordinate Courts empowered to hear original suits. A suit to recover possession of immoveable property on title (even though it be alleged that the property in suit forms part of a *waqf* property and had been improperly alienated by the *mutwalli* is not a suit of the nature specified in S. 539, and, therefore, it is not within the power of the District Judge, when hearing a suit under S. 549, to pass a decree for recovery of possession of such property. But the plaintiff in such a suit can obtain a direction from the District Judge to the *mutwalli* instructing the latter to get in the trust-property as ascertained by the Judge. **Ghazafar Husain Khan v Yawar Husain. 2 A L J 591= A W N 1905. 208=28 All 112.**

(2) Public charities—"Civil jurisdiction," meaning of—Jurisdiction of High Court over scheme suit in respect of mofussal temple.

1158—C. P. C. S. 92 (539)-Statute, construction—Letters Patent—High Courts Act, S. 9.

The words "civil jurisdiction" in S. 539 of the Civil Procedure Code of 1882 mean "Ordinary Original Civil Jurisdiction" and not "Appellate Civil Jurisdiction" and the High Court of Madras has no jurisdiction to try a suit for a scheme under S. 539 C. P. C. (1882) in respect of a temple in the mofussal (e. g., Rameswaram). *Obiter.* The question is not merely one of jurisdiction but also one of private rights: and unambiguous words in the statute are necessary to take away private rights or to extend or curtail the jurisdiction of Courts like the High Court. The presumption is generally against the extension of the original jurisdiction of the High Court. The Letters Patent contemplates that all the provisions therein contained should be subject to alteration by the Indian Legislature and it would not be inconsistent with the Letters Patent for the Indian Legislature to confer upon the High Court original jurisdiction in a particular class of suits arising outside the limits of its ordinary original jurisdiction. A provision by the Indian Legislature conferring such a power on the High Court will not be opposed to S. 9 of High Courts Act.

Advocate General of Madras v Arunachellam Chettiar. (191[illegible] 5 Ind Cas 729=20 M L J 387=7 M L T 292.

(3) Revision—An order is not open to revision by the Chief Court.

1159—C. P. C. Ss. 92, 93=(1882 S. 539).

An order of a Collector granting permission under S. 539 C. P. C., 1882, to sue for the removal of the mahant of a temple, is not open to revision by the Chief Court. (24 Mad 685; 24 Cal 418, Ref.) **Dhian Das v Jegat Ram. 104 P R 1910 Civil.**

(4) Reference—High Court.

1159A—C P C Ss. 92, 113, O 46 r 1 S 141= 1882 Ss. 539, 617, 647—Reference—High Court.

Sections 617 and 647, Civil Procedure Code, apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding.

Section 617 was not intended to provide for supposititions cases which do not actually arise in a proper proceeding before the Court.
Mahamad v Ahmedbhai 3 Bom L R 368= 25 Bom 327.

(5) Enhancement suit—Equitable rate—Preling rate.

1160—C P [illegible] s 92, 93; O, 41; r. 23; s. 115, 1882 secs. 540, 562, 622—Bengal Tenancy Act VIII of 1885 sec. 30.

When no appeal lies to the Subordinate Judge, a second appeal to the High Court does not lie from his decision.

When therefore a decree was passed by the Munsif upon an award, and an appeal was preferred to the Subordinate Judge who set aside the decree of the Munsif on the ground that the

C P C (1908) S.92=(1882 S. 539)-*Concld.*

(5) Jurisdiction—*Concld.*

award was bad and sent the case back for the trial of the case on the merits.

Held—that the award being good and valid, no appeal lay to the Subordinate Judge and no appeal lay to the High Court against his order and the remedy lay under sec 622. **Ganga Charan Roy v Sasti Mandal. [illegible] C W N 614= 29 Cal 252.**

(6) Reliefs sought—Public charitable trust-Breach—Suit-Jurisdiction-Court in which suit should be brought.

1161—C P C Ss. 92-93=1882 s. 539—Under [illegible] 539 of the Civil Procedure Code, one of the two conditions must exist in order to bring a suit within its purview. Either there must be any alleged breach of any express [illegible] constructive trust and created for public, charitable or religious purposes, or there must be some direction of the Court deemed necessary for the administration of any such trust. If in any suit one of these two conditions exist it must be filed in the Court mentioned in the section either by the Advocate—General or by two or more persons interested in the trust with the sanction of the Advocate—General previously obtained.

It is not necessary to such a suit that a relief should be claimed of the description of the clauses *a*, *b*, *c*, *d* and *e* in that section. These reliefs are not exhaustive and any other relief may be claimed in such a suit. **Amritram Harinarayan v Ramji Vallabh 10 Bom L R 87= 3 M L T 172.**

(7) Dispute about succession to trusteeship —Application to file award—Jurisdiction of Court.

1162—C P C S. 92 and sch. II, r. 20—Dispute about succession to trusteeship cannot be referred to arbitration—Application to file award in such cases. **Mahomedan Law—Wakf 6 Ind Cas 219=7 A L J 761.**

Ss. 92, 93—Recovery of cost of noting non-acceptance of dishonoured bill or note. **See** C P C O. 37 r. 6. Case No. 2916. **L B R 1893—1900, 645.**

C P C 1908 S. 93

Notes—This section corresponds with the salt para of section 539 of Act XIV of 1882.

C P C (1908) S.93=(1882,S.539)-*Concld.*

The powers conferred by this section on the Advocate-General are exercised:—

(*a*) in Lower Burma, by the Government Advocate (see *Burma Gazette*, 1893, Pt. I., p. 99);

(*b*) in Maulmein in respect of the trust for the maintenance of certain pagodas, by the Deputy Commissioner (see *Burma Gazette*, 1889, Pt. I., p. 221);

(*c*) in Mandalay, by the Deputy Commissioner (See Burma Gazette, 1890, Pt. I p. 22)

(*d*) in the Central Provinces, by the Secretary to the Chief Commissioner (see Central Provinces List of Local Rules and Orders, Ed. 1896, p. 157;

(*e*) in the Madras Presidency, by all Collectors, except the Collectors of Madras (see Madras List of Local Rules and Orders, Ed. 1898, Vol. I., p. 197);

(*f*) in the North-Western Provinces and Oudh by the Legal Remembrancer (see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 114.)

C P C 1908 S 93.

See Cases under. C P C [1908] S. 92.

C P C (1908) [illegible] 93.

See C P C (1908) O. 1 r. [illegible] (1) Case No 1484. **33 Cal 905.**

C P C **S. 93**—Application for execution. **See** C P C O 21 r 10. Case-No 2340. **2 M L T 94.**

C P C 1908 S. 94

Notes—This section is new. The general powers of Courts in regard to arrest and attachment before judgment, issue of temporary injunction, appointment of receiver and other interlocutory orders, have been summed up in this section and the details of procedure have been relegated to the rules. **See orders 38, 39 and 40.**

a The general powers of Courts to issue warrant for arrest of the defendant before judgment are summed up in clause *a*. The details of procedure contained in sections 477 to 482 of Act XIV of 1882 will be found in the first schedule, Or. XXXVIII, rules 1 to 4. *See notes under these rules.*

C P C 1908 S. 94-*Concld.*

b The general powers of Courts to order attachment of defendant's property before judgment, are summed up in cl. *b*. The details of procedure contained in sections 483 to 489 of Act XIV of 1882, will be found in the first schedule. Or. XXXVIII, rules 5 to 12.

c The general powers of Courts to grant temporary injunction are summed up in clause c. The details of procedure contained in sections 492 to 497 of Act XIV of 1882, will be found in Or. XXXIX, rules I to 5 of the first schedule. *See notes under those rules.*

d The general powers of court to appoint a receiver are summed up in clause *d*. The details of procedure contained in sections 503 to 505 of Act XIV of 1882 will be found in the first schedule, Or. XL rules 1 to 5.

e The general powers of Courts to make other interlocutory orders are summed up in clause *e*. The details of procedure contained in sections 498 to 502 of Act XIV of 1882 will be found in the first schedule, Or XXXIX rules [illegible] to 10.

C P C s. 95 (1908)=(1882-s. 491) (1859, s. 88).

See Compensation—Civil Cases.

1163—C P C S. 95—Interlocutory injunction—Damages for, wrongful obtaining of such injunction—Appeal. **A W N 1893, 220.**

1164—C P C,(1908) s. 95—Small Cause Court—To award compensation for attachment before judgment on insufficient grounds—C P C S. 401—Improper arrest. A Small Cause Court is competent to award compensation under S. 491, C P C for procuring an attachment before judgment on insufficient grounds. *Obiter*.—It has not jurisdiction to award compensation in cases of improper arrest. **Ibrahim Rowthar v Sangaram Shetty. 26 Mad 504.**

1165—C P C S.95=(1882) S.491-"Awarded in its decree"—Compensation for attachment before judgment on insufficient grounds.—

The order awarding compensation under S. 491 should be embodied in the decree itself, and the determination of the question cannot be postponed to a date subsequent to the passing of the decree. **Kopilo Patro v Kasinahda Patro. 17 M L J 310.**

C P C (1908) S.95=(1882,S.491)-*Concld.*

1166—C P C S. 95 O 38 r 5 cls. (1 & 2) 6 cl. 1=(Ss. 491, 483)—General damages—Suit for compensation for wrongful attachment before judgment, awardable:—

General damages are recoverable in [illegible] suit for compensation for wrongful attachment before judgment. **Pabani Kumarasamia Pillai v Udayarhadan. (1908) 18 M L J 490= 32 Mad 170.**

1167—C P C S. 95; S. 104; O. 43 r.1=(1882) Ss. 491, 497, 588.

Improper attachment before judgment–Award of compensation—Appeal.

No appeal lies under section 588 from an order passed under section 491 of the Code of Civil Procedure.

The words "no other such orders" in the opening of section 588 and the omission of orders under section 491 therefrom lead to the inference that the legislature expressly excludes a right of appeal in respect of such orders. (24 Mad 62 ref to.) The [illegible] fact that an order under section 491 is embodied in the decree does not make it form part of the decree [illegible] to render section 540 applicable. **Lok Nath v Amir Singh 2 A L J 602=1905 A W [illegible] 197= 28 All 81.**

1168—C P C Ss. 95, 104 and order 43 r. 1= (1882 ss. 491, 588).—

No appeal lies against an order under S. 491 of the C P C 1882. **Narasinga Bakshi v Govinda Bakshi. 24 Mad 62= 10 M L J 355.**

Notes—Fol: 28 All 81=2 A L J 602=W N (1905) 197. Ref. 17 M L J 310.

C P C S. 96=S. 540 of 1882.

Notes–This section is almost similar to sec. 540 of Act XIV of 1882. Clause (3) which is new has been added to this section. "As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction [illegible] the view that no appeal shall lie from a consent decree."—*See the Report of the Special Committee.* In the Bill another clause was introduced to the effect that "no appeal shall lie [illegible] matter of costs only" but it has been omitted in the Act on the ground that case law on the subject is sufficiently clear.

Ss· 96 (1, 2)=(1882 s. 540) (1859 s. 332) Act XXIII of 1861 s. 23.

See Cases under.—

(1) Appeal—Costs.
(2) Appeal—Decrees.
(3) Appeal—Ex-parte Cases.
(4) C P C O 21 r 2 & O 41 r 23.
(5) C P C s 115.

C P C (1908) s. 96.

See C P C (1908) s. 2 Case No. (9).

28 Cal 81.

C P C (1908) s. 96 cl. 1—Suit by minor in forma pauperis—Order directing next friend to pay Court fees—Collectors application to execute dismissed—Appeal—Revision.

See C P C (1908) s. 47. Case No. (566).

23 Mad 73.

C P C (1908) s. 96 cl. 2—Suit by minor in forma pauperis—Order directing next friend to pay Court fees—Collectors application to execute dismissed—Appeal—Revision.

See C P C (1908) s. 47 Case No. (565).

23 Mad 73.

C P C s. 96 (1, 2) (1908) s. 540 (1882).

See Appeal—Decrees. Case No. (475).

30 All 22.

C P C s. 96—

See C P C O 14 r 6. Case No. 2039.

A W N 1886, 233.

C P C s. 96—Court's inherent power to set aside exparte decree.

See C P C O 9 r 13. Case No. 1947.

13 C W N 493.

C P C s. 96—Appeal against orders in this section.

See C P C O 9 r 13. Case No. 1933.

12 O C 25.

C P C s. 96 (1) (2).

See Cases under.—

(1) Appellate Court.
(2) Limitation Act 1877 s. 12.
(3) Practice-Civil Cases-Appeal.

1169—C P C S. 96 (1) (2)=Ss 540, 542, 561, 566.—Pleadings—Points not taken. It is wrong and illegal to decide an appeal upon a point not taken in the pleadings not contained in any issue, and upon which none of the parties even had an opportunity of adducing evidence.

Karbasangavda v. Gadiava 1889, P. J., 333.

1170-C P C S. 96 (1) (2)=S.540-Plaint, form of—Variance—Conduct of parties.

Where a plaint was, in its terms, one to set aside a decree to which the plaintiff was not a party, as fraudulent, but it appeared from the issues raised by the Court of first instance that the pleadings were treated by that Court and the parties as simply raising the question as to which of the parties were entitled to the land in question and the case proceeded to trial on that footing, it was held that the lower Appellate Court ought not to have regarded the plaint, according to its literal import, and therefore to have dismissed the suit. **Fakir Apa v. Rayapa 1884, P. J., 128.**

1171-1172—C P C Ss 96, 104. O 43 r 1 (1882) Ss. 540 and 588 (c) Decree—Order—Order adjudicating rights of defendants in an interpleader suit—Appeal.

The adjudication upon the claims of the defendants in an interpleader suit is a decree, and stands on the same footing as an adjudication of any other claims, and is appealable under the provisions of S 540. The direction as to interpleading is an order and appealable under S 588 only. **Maharaj Singh v Chittarmal 4 A L J 683 =A W N (1907) 270.**

1173A—C P C S 96=(1882 S 540).

An order dismissing a suit as abated is a decree from which an appeal and a second appeal will lie (18 Mad 496 foll.) **Meenatchi Achi v Ananthanarayana Aiyar. 12 M L J 380=26 Mad 224.**

1173B—C P C s 96 (1)(2)= S 540 of 1882.

An order dismissing objections to the execution of a decree for default is a "decree" within the meaning of section 2 Civil Procedure Code and an appeal lies from such an order under section 540 Civil Procedure Code as amended by Act VII of 1888. (15 All 359; 23 Cal 115 & 827 distinguished.) **Lal Narain Singh v. Mahomed Rafiuddin 28 Cal 81.**

CPC (1908) S.96=(1882,S.540)-*Concl'd*

1174—C P C S 96 (1908)—Suit of small cause nature tried as regular suit by mistake by Judge having small cause powers—Decree—Appeal—Provincial Small Cause Courts Act 1887, ss 16, 33. **U [illegible] R 1907, Provincial Small Cause Courts Act I.**

1175-C P C S.96 (1) (2)=S.540-Necessity for successful party to appeal [illegible] finding.

Sub-Judge decreed for plaintiffs, and found they were mirasdars. *Held* that they were not bound to appeal as the District Judge was wrong in holding such finding conclusive against plaintiffs. **Parvati v. Mohidin 1889, P J.; 208.**

1176—C P C S 96 (1) (2)=S. 540-No appeal -Res judicata—Misdescription of property.

There is no appeal where the decree is entirely in favour of the defendant. Any misdescription of property could not have formed an essential element of the jural relation between the parties on which the decree rested and from the decree itself no adjudication in the plaintiff's favour could properly be derived [illegible] *resjudicata*
Balwant v. Mahipat 1888. P J.. 293.

1177—C P C S.96(1908)-Need not necessarily be brought where no doubt of plaintiff's title.

Two persons joined in a suit and claimed the offices of karnam and shroff as being hereditary. The offices formed portions of a permanently settled estate of which first defendant was proprietor. The second defendant alleged to have possession of the offices; the second plaintiff who had the titular right to them being thus wrongly kept out. *Held*, that it was not necessary that the suit should have been for a declaration there being no doubt as to the second plaintiff's title and that it was properly brought for possession. **Sadasive Pillai v. Kalappa Mudaliar**
24 Mad 39.
See 7 C W N 314=30 Cal 20.

C P C (1908) S. 97.

Notes :—This section is new. It has set at rest the diversity of judicial opinions which hitherto existed on the point. The principle laid down in 23 Cal 279, which was overruled by the Full Bench 29 Cal 758: 5 C W N 617, has been adopted. In the former case it was held that omission to appeal from the preliminary order precludes the parties from questioning the correctness of the preliminary order in an appeal from the final decree. This section has rendered inoperative the effect of the Full Bench case above referred to and also the cases of 23 Cal 406 (24 Bom 302.) For the meaning of preliminary decree, see case under section 2, cl. (2).

"The Committee have inserted [illegible] express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earliar state. This section renders it obligatory upon a party who considers himself aggrieved by preliminary decree to appeal from that decree, at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is [illegible] most useful provision as tending to that which is so desirable, namely, finality in litigation "—Report of the Committee.

C P C (1908) S. 98=S. 575 of 1882.

Notes :—The section corresponds with section 575 of Act XIV of 1882. The words "*they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only*" have been added. No other material alterations have been made in this section.

"The wording of the proviso has been altered; it now deals only with the decision on the point of law referred. "—*Report of the Select Committee.*

C P C S 98=1882 S 575,

1 Act XXIII of 1861. S 23—Judgs sitting in appeal from original Civil Jurisdiction 1178.

2 Order in execution of decree—Appeal —Party to suit 1179

3—4 Questionable whether S 575 of the Code is applicable when application is made to the High Court under the Code 1181.

C P C (1908) S.98=(1882, S.575)-*Contd.*

5 Reference of appeal to other—Judges of same Court-Composition of Bench hearing referred appeal—Presence of referring Judges necessary 1182

6 Nothing in the language of s 575 to support the view that the third Judge can sit and hear the appeal alone 1183

7 Judgment of the affirming Judge—Decree—Charter Act Arts 15 and 36—Appeal—Points on which the appeal should be heard 1184

8 Decision when appeal heard by two or more Judges - Letters Patent of 1885 cl 15 1185.

9 Difference of opinion on Division Bench regarding preliminary objection as to limitation—Letters Patent. N W P 1186

10 Original side appeal-Letters Patent Art 36 1187

11 Differenee of opinion—Art 36 of Letters Pattent 1188

12 Two Judges differed—Appeal must be dismissed each party to pay his costs 1189

13 Effect of two Judges hearing an appeal from single judge—being divided opinion; 1190

14 Difference of opinion between two Judges 1191

15 Reference to third judge 1192

16 Composition of Bench to hear appeal referred to a third Judge under s 575 of the Civil Procedure Code—Judges differing in opinion 1193

17 Judge or Judges can deal with the whole case and not merely the point on which the reference is made 1194

18 Argument before Judge or Judges to whom the case is referred 1195

19 Appeal referred owing to a difference of opinion on a point of law 1196

20 Difference of opinion between Judges hearing appeal—"Judgment"—Reference to Full Bench--after delivery of dissentient judgments on the appeal—Reference ultra vires 1197

21 Reference to third Judge owing to difference of opinion among the Judges composing a Division Bench Procedure 1198

C P C S.98 of (1908)=(1882) S 575-*Contd*

See cases under :—

1 Letters Patent, High Court, Cls. 15, 36.

2 Review—Ground for review.

(1) Act XXIII of 1861. s. 23—Judges sitting in appeal from original Civil—Jurisdiction.

1178.—S 98 of (1908)=S 575 (1882).—

S 23 of Act XXIII of 1861 referred only to the late Sudder Court, and, although this Act formed part of the Court of Civil Procedure, it is clear that sec 23 could not apply to Judges sitting in appeal from the original civil jurisdiction, for this reason, that all the Judges of the Court so sitting in appeal are supposed in law to be equal, whereas s 23 of Act XXIII of 1861 only contemplated an appeal from a Court of inferior jurisdiction to the late Sudder Court, and had nothing at all to do with the Court of Appeal from the original civil jurisdiction as that Court is now constituted. **Greenway v Hogg. Bourke, A O C. 139.**

Notes :—Dist : 13 W R F B 9. Fol : 26 Cal 531.

(2) Order in execution of decree—Appeal party to suit.

1179.—C P C S 98=S 575 of 1882.—

Semble, S. 23 applied to orders made in execution of decrees, but the right of appeal was given only as between the parties to the suit in which the decree or order was made. **Annamalai Chetty v Muthulinga Pillai. 6 Mad H C R 360**

(3-4) Questionable whether S 575 of the Code is applicable when application is made to the High Court under the Code.

1180—1181.—S 98=(1882 S 575) – *Quære.*

Having regard to the explanation to S 647, Civil Procedure Code, it is questionable whether S 575 of the Code is applicable when an application is made to the High Court under S 622 of the Code ? **Mancharam v Fakirchand 3 Bom L R 58=25 Bom 478.**

(5) Reference of appeal to other Judges of same Court—Composition of Bench hearing referred appeal--Presence of referring Judges necessary.

1182—C P C S. 98=1882 S. 575-Rules made by High Court, N. W. P.—

The only Bench which can legally deal with an appeal which has been referred under the provisions of s. 575 of the Civil Procedure Code is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the reference. (6 W R 269: B L R, Sup Vol 774, and 36 L J, Q B 137, referred to.). The word "judgment" as used in Rule 11 of the Rules made by the High Court, North-Western Provinces, to regulate references under s. 575 of the Civil Procedure Code, must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment.

Rohilkhand and Kumaon Bank v. Row, 6 All 468.

Notes:—Ref: 7 All 523; 9 All 625; F B; 6 Bom L R 131.

(6) Nothing in the language of S. 575 to support the view that the third Judge can sit and hear the appeal alone.

1183—C P C S. 98=(1882 S. 575).—

Per Chandavarkar J: — There is nothing in the language of S. 575 to support the view that the third Judge to whom reference is made under the section cannot sit and hear the appeal alone.

Jehangir v. Secretary of State. 6 Bom L R 132.

(7) Judgment of the affirming Judge—Decree—Charter Act Arts. 15 and 36—Appeal-Points on which the appeal should be heard.

1184—S. 98 (1908)=s. 575 (1882)—

The decree of one of two judges of a Division Bench, whose judgment has prevailed under the provisions of S. 575 of the Code of Civil Procedure, is appealable under S, 15 of the Letters Patent. On appeal under the Letters Patent, the appellate Court has jurisdiction to hear the appeal not merely on the points on which the Judges of the Division Bench differed, but also on other points raised in the appeal. **Kunhunni v Srivullabhan. 11 M L J 10 F B.**

(8) Decision when appeal heard by two or more Judges-Letters Patent of 1865 cls 15.

1185-C P C S. 98=1882 s. 575.-

Right of appeal given by cl. 15 of the Letters Patent is not taken away by s. 575 C P Code. If the judgment of the lower Court is confirmed by reason of one of the Judges of the appellate Court agreeing upon facts with the Court below, an appeal will be against such judgment, notwithstanding the provisions, of s. 575 C P Code. (3 Bom 204 approved.) **Gridharji Maharaj Tickait v Porushotum Gossami. 10 Cal 814.**

Notes:—Fol: 11 M L J 10 F B. Dist: 11 All 176.

(9) Difference of opinion on Division Bench regarding preliminary objection as to limitation—Letters Patent N W P.

1186.—C P C S. 98 (1908)=S. 575 (1882). "Appeal is heard"—Case to which action does not apply—Letters Patent S. 27.

S 27 of the Letters Patent for the N W P has been superseded in those cases only to which s 575 of the Code of Civil procedure properly and without straining the language applies. There are many cases to which s 575, even with the aid of s 647 does not apply, and to these S. 27 of the Letters Patent is still applicable. One of the cases to which sec 575 of the Code does not apply is where, a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s 5 of the Limitation Act (XV of 1877) for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a " hearing " of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless " affirm " the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under sec 27 of the Letters Patent, prevail. (3 Bom 204) (10 Cal 813) distinguished. Where, in such a case, the provisions of the second paragraph of section 575 of the Code were erroneously applied, and the judgment of the Junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s 10 of the Letters Patent, affirmed such judgment, *held* that under the circumstances, there was a mistake or error apparent on the face of the record, and there was sufficient cause for granting a review of the Court's decree, under s 623 of the Code. **Husaini Begam v The Collector of Muzaffarnagar.** **11 All 176. 9 W R 27.**

Notes :-Ref: 25 Mad 548.

(10) Original Side appeal—Letters Patent Art 36.

1187.—C P C S 98=S. 575 of 1882.

Where the appellate Judges are divided in opinion in Original Side appeal, S 575, C P C has no application, and the opinion of the Senior Judge prevails under Art. 26 of the Letters Patent. **Roop Laul v Lakshmi Doss.** **29 Mad 1 at 24.**

(11) Difference of opinion—Art 36 of Letters Patent

1188.—C P C S 98=(1882 s 575)-Revision—S 575—Art. 36 of Letters Patent :—

Where two Judges differ in the matter of a revision petition S 575, C P C applies and not Art. 36 of the Letters Patent. **Narayanasami Reddi v Osuru Reddi.** **25 Mad 548.**

Notes :—Ref :—32 Mad 456 ; 16 M L J 27 ; 14 M L J 37 F B ; 27 Mad 386, 19 M L J 470.

(12) Two Judges differed—Appeal must be dismissed each party to pay his costs.

1189.—C P C S 98=(1882) s 575.—Practice.

The two Judges hearing the appeal differed in their opinions.

Held, that under Sec 575 the appeals must be dismissed each party to pay his costs.

Meerama v Babu Bhikaraj Sagarmull. **14 Bur L R 257.**

(13) Effect of two Judges hearing an appeal from single Judge, being divided in opinion.

1190.—C P C S 98 (1908)=S 575 (1882).

C P C S 575, does not in respect of appeals under S 10 of the Letters Patent, override s 37 of the Letters Patent, and consequently, when two Judges of the Bench hearing a Letters Patent appeal differ, the opinion of the senior Judge prevails. **Lachman Singh v Ram Lakan Singh.** **1903 A W N 162= 26 All 10.**

Notes :—Fol : 29 Mad 1.

(14) Difference of opinion between two Judges.

1191.—C P C S 98 (1908)=S 575 (1882)

It was held under this section that, if the Judges differed in opinion on points of law and did not state the points on which they differed, there was no determination of the case ; so that, if the case were then referred to other Judges for final determination, they would have jurisdiction to go into the whole case. **Khelut Chunder Ghose v Tarachurn Koondoo Chowdhry.** **6 W R 269.**

Notes:--Appl: 27 Cal 185; 6 All 468; 12 W R 397; 8 W R 171; 9 B H C R 53. Ref: 9 W R 1 F B; 12 Cal 614; 14 Cal 464. Affirm: 8 B L R 104 P C.

(15) Reference to third Judge.

1192—C P C S. 98 [1908]=S. 575 (1882).

Held, per Barkley, J., that it is competent to one of a bench of two Judges to make a reference to a third Judge, under Section 575 of the Code of Civil Procedure, 1877. **Telu Mal v Subha Singh.** **P R 90 of 1880.**

(16) Composition of Bench to hear appeal referred to third Judge under s. 575 of the C P C—Judges differing in opinion.

1193—C P C—S. 98 (1908)=S. 575 (1882).

On an objection being taken that it was not competent to a Single Judge sitting by himself and apart from the Judges who have first heard the appeal, to hear an appeal referred under section 575 Civil Procedure Code, the language of the section and the Full Bench case. 6 All 468. being put forward as supporting the objection. *Held*, per Weir J.

The language of the section 575 does not appeal to imply that the appeal must necessarily be heard again at the reference, by the two Judges who first heard it and differed.

Subbayya v Krishna. **14 Mad 186.**

(17) Judge or Judges can deal with the whole case and not merely the point on which the reference is made.

1194—C P C S. 98=[1882 S. 575].—

The Judge or Judges to whom a case is referred under this section. can deal with the whole case and not merely the point on which the reference is made. **Maung Po Te v. Maung Po Then,** **14 Bur L R 59 F B.**

(18) Argument before Judge or Judges to whom the case is referred.

1195—C P C S. 98 (1908)=S. 575 (1882)—Suit, dismissal of, under s. 375, Code of Civil Procedure—Misjoinder of parties—Champerty—Maintenance-Contract to supply funds for carrying on litigation not opposed to public policy—Contract of sale of property not in possession of the vendor can operate as present transfer—Failure of consideration, plea of.—

The terms of a contract entered into by A S with the plaintiff were,that A S sold a half-share in a Taluka to the plaintiff for one lakh and fifty thousand rupees; that fifty thousand rupees were to be held in deposit by the plaintiff to be expended in litigation about the said Taluka and in giving A S a monthly allowance of fifty rupees The deed of sale executed by A S in favour of the plaintiff recited that one lakh of rupees had been paid to A S and a separate receipt for that sum was taken from him. The plaintiff and A S brought a suit against the defendant for possession of the aforesaid Taluka on the 21st February 1891. In the plaint it was stated that, not having sufficient funds to carry on the suit. A S had sold half the share in the estate to the plaintiff who was joined as a co-plaintiff. Three days before the date of first hearing A S filed a petition and a compromise stating he was satisfied that under law and custom he had no claim to the estate; that he had been persuaded by the plaintiff to execute a sale-deed in his favour for which he (A S) got no lawful consideration; and he prayed that the suit might be dismissed under s. 375 of the Code of Civil Procedure. Some three days after A S registered a petition in the office of a Sub-Registrar under s. 373 of the Code of Civil Procedure, praying that his suit be unconditionally dismissed. Subsequent to this the defendant filed a written statement in which, among other pleas, it was urged that the plaintiff's suit was champertous and unmaintainable, and was also bad for misjoinder of parties. The Court of first instance dismissed the plaintiff's claim. *Held*,(*per W Blennerhassett, J C*) that the joinder of the plaintiff in this suit as the purchaser of half of *A S*'s share did not amount to a misjoinder of parties. (18 All. 131), not followed. That the specific English Law of maintenance and champerty has not been introduced into India. The defendant, therefore, could not directly plead that the suit was unmaintainable on the ground of champerty. That the agreement on behalf of the plaintiff to supply A S with the necessary funds was a fair agreement, and was in no way contrary to public policy, and the suit was maintainable. That where an assignee sues on his assignment and proves it, an adverse party cannot take objection that there was no consideration. *Held (per R Scott, A J C)* that whether the contract between A S and the plaintiff was void or voidable or a valid and binding agreement, the plaintiff could not sue for possession of half the Taluka in the present suit. *Held*, further, that the agreement relied upon by the plaintiff was a grambling in litigation and opposed to public policy, and therefore void, *Held (per G. T. Spankie, A J C.)*, that there was a contract of sale between the plaintiff and A S under which there was a present transfer of a moiety of the Taluka to the plaintiff. That a contract of sale of property, which is not in the possession of the vendor, and which is the subject of litigation, and as to which the vendor's title may never be established, can operate to give to the purchaser a right to obtain possession of the property and that therefore the contract of sale between A S and the plaintiff could operate as a present transfer of a moiety of the Taluka to the plaintiff. That the defendant could not defend the suit on the ground that the

C P C (1908) S. 98=(1882 S.575)-*Contd.*

contract of sale was extortionate, unconscionable and fraudulent, and that there had been failure of consideration. That there was nothing in the contract of sale "against good policy and justice, tending to promote litigation or what is in the legal sense immoral," and that the suit was maintainable. That the withdrawal of A S from the suit might perhaps be a reason for the amendment of the plaint, but it was not a ground for dismissing the suit. Upon the defendant's attempt to address an argument upon a point with regard to which the Bench had come to a unanimous decision, *held*, that under s. 575, Civil Procedure Code, only the point of law on which there is a difference of opinion should be heard by the Judge or Judges to whom the appeal may be referred, and not points on which there is no difference of opinion. **Kazim Hosein Khan v Lal Achal Ram** **2 O C 149.**

Notes:—Cons: 7 O C 181.

(19) Appeal referred owing to a difference of opinion on a point of Law.

1196—C P C S 98=1882 S 575.

Where, owing to the difference of opinion between two Judges, an appeal was referred to the Chief Justice under Civil Procedure Code, s. 575, and was heard by him sitting with the two other Judges,—*Held* that the whole appeal was open for argument, and not only the point of law on which the Judges had differed in opinion.

Seshadri Ayyangar v Nataraja Ayyar
21 Mad 179.

Notes:—Ref 30 Bom 508=8 Bom L R 407: 6 Bom L R 131: 230. Fol 29 Mad 534=16 M L J 435=1 M L T 127, 9 C W N 32,

(20) Difference of opinion betwen Judges hearing appeal—"Judgment"—Reference to full Bench after delivery of dissentient judgments on the appeal—Reference ultra vires.

1197—C P C S. 98 [1908]=S 575 [1882]

Held that an order of reference under s. 575 after delivery of judgment was illegal as the Judges, as soon as they had delivered their judgments, ceased to be possessed of the case. **Lal Singh v Ghansham Singh.**
9 All 625; 7 W N 154.

C P C (1908) S.98=(1882, S.575)-*Concld.*

Notes:—Ref: 16 All 136 F B. Dist: 6 Bom L R 151.

(21) Reference to third Judge owing to difference of opinion among the Judges composing a division Bench—Procedure.

1198—C P C S. 98=S. 575 of 1882.

Held, dissenting from (6 All 468), that a reference under Section 575 of the Civil Procedure Code can legally be made to a third Judge, and that the tribunal which hears the appeal on the second occasion in consequence of such reference should consist of such third Judge, and not that Judge sitting together with the Judges who first heard the appeal.—**Mussammat Sahibzadi v. Newton,**
15 P R 1887.

C P C (1908) S. 99=S. 578 of 1882.

Notes:—This section corresponds with section 578 of the C. P. Code of 1882. The following changes have been introduced by this section. The words "*misjoinder of parties or causes of action*" and the words "*in any proceeding in the suit*" have been added.

"The Committee have extended this clause in order to give the Courts a larger discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in 26 Bom 259 and 27 Mad 80, and in a recent decision of the Calcutta High Court". —*See the Report of the Special Committee.* In 26 Bom 259 and in 24 Cal 540, the High Court in second appeal reversed the decree of the lower Courts on the ground of misjoinder of plaintiffs: and in 27 Mad 80, the High Court held that misjoinder of causes of action is not a mere irregularity as can be condoned and cured under s. 578 of the C. P. Code of 1882. The Privy Council in 36 Cal 780=6 A L J 567 at p 583 held that misjoinder of causes of action is a mere irregularity and that the appellate Court cannot reverse the decree on this ground alone. In 2 C L J 602, the question as to whether misjoinder of causes of action can be cured under this section or not, has been fully discussed. In order to meet the above decisions the above change has been introduced in this section, and under the present Code no decree is to be reversed or modified on account of misjoinder of parties or causes of action.

C P C S 99 (1908)=S. 578 (1882)

1 General 1199-1200.
2 Irregularities in proceedings 1201—1209A.

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1 General.

1 Jurisdiction 1199.
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2 Irregularities in proceedings.

1-2 Verification and signature by agent—Irregularity not material 1202.
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5 Death of next friend pending appeal by minor—Omission to appoint new next friend mere irregularity 1205.
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8 Irregularity 1207A.
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10 Misjoinder of causes of action—Substainability of plea in second appeal —Applicability to suits and appeals instituted before Act V of 1908 came into force 1208.
11 Munsiff instead of recording the evidence in full in the language of the Court, recorded in English as it was a suit for rent — Mere irregularity 1209.
12 Admissibility of document not produced with plaint — Document on which the suit is based—Prejudice by reception at late stage 1209A

C P C S. 99=S. 578 (1882).

See Cases under.

Minor—Representation of minor in suits.

See also Cases under.

(1) Specific Relief Act 1877 s. 42
A W N 1887 231.

(2) Suits-Valuation Act 1887 S. 81
20 M L J 726=8 M L J 404=8 Ind Cas 545.

(3) Transfer of Property Act 1882 S. 89.
5 Bom L R 389.

(4) Jurisdiction. **2 Ind Cas 677**

(5) Misjoinder of plaintiffs and Causes of Action.

C P C (1908) S 99=(1882. S.578)-*Contd.*

(6) Ben Act XI of 1859 S. 9.
30 Cal 794=7 C W N 609,

(7) Evidence Act (1872) Ss. 65, 167.
A W N 1881. 9.

(8) C P C O 3 r 2. Case No 1595.
4 L B R 285,

(9) C P C O 3 r 2. Case No 1591.
109 P R 1907.

C P C S. 99 (1908).—Petition to re-open execution—Receiver. **See** *C* P C (1908) S. 47. Case No (553). **[illegible] C W N 627**

C P C S. 99 (1908).
See C P C (1908) S. 16. Case No (81).
2 L B R 1903—1904,117.

C P C (1908) S. 99.—Suit may be treated as an application under S. 244 (1882). **See** C P C (1908) S. 47. Case No (151). **5 C L J 328.**

C P C S. 99—Applicability and scope. **See** C P C O 9 r 9. Case No 1776. **U B R 1897. 237.**

C P C S. 99—Dismissal of former suit for default—Appeal from dismissal order. **See** C P C O 9 r 9. Case No 1822 **7 A L J 675.**

C P C S. 99.—Right of assignee to sue for refund of the price or for declaration of his right. **See** C P C O 21 r 16. Case No 2435.
13 Bom L R 973.

C P C S. 99—Application for attachment of immoveable property to contain certain particulars. **See** C P C O 21 r 13. Case No 2354. **28 All 244.**

—S. 99—Erroneous order of remand.
See C P C (1908) O 41 r. 23 Case No. (3131).
32 Mad 83.

—S. 99—Powers of Courts in remand cases.
See C P C (1908) O 41 r 23 Case No. 3137.
11 C W N 380.

—S. 99--Appellate Court may frame issues and refer then for trial to the Count whose decree appealed. **See** C P C (1908) O 49 r 25. Case No. (3144). **29 All 660.**

—S. 99—Disallowance of claim.
See C P C (1908) O 21 r. 61 Case No. (2561.(
1 M L J 478.

—S. 99—Contents and signature of judgment. **See** C P C (1908) O 41 r. 31 Case No. (3152). **13 C W N 143.**

1 GENERAL.

(1) Jurisdiction.

1199—C P C S. 99=(1882 S 578).

That the word "jurisdiction" may either mean that is ordinarily understood by the term "jurisdiction" when used with reference to the Local or pecuniary jurisdiction of a Court or its jurisdiction with reference to the subject matter of a suit; or it may mean the legal authority of a Court to do certain things. The term " juris-

(1) General-*Concld.*

diction", in s. 578 C P C. is used in the former sense.

That S. 578 of the Civil Procedure Code is applicable in curing the defect of an erroneous order of remand if it does not affect the merits of the case. **Mohesh Chunder Das v Jahiruddi Mollah.** **5 C W N 509= 28 Cal 324.**

Notes—Ref 28 Mad 437=15 M L J 236; 6 C L J 547; 12 C W N 590. Fol: 5 C L J 71; 11 C W N 380; 9 O C 80.

(2) Improper remand when cured.

1200—C P C S. 99 (Ss. 564 (Omitted in N C) 578).

S. 578 of the Code cures the defect in an irregular order the remand made by an appellate Court unless the merits of the case are shewn to have been affected in any way by the order. (5 C L J 71 ref to.) **Debendra Nath Bhattacharjee v Basanta Kumar Chakravarti.** [1907] **5 C L J 328.**

(2) IRREGULARITIES IN PROCEEDINGS.

(1-2) Verification & signature by agent—Irregularity not material.

1201—1202—C P C S. 99.

Verification and signature by agent—Irregularity not material. **7 N L R 33.**

(3) Verification—Defect—Objection on appeal—Irregularity.

1203—C P C S. 99=(1882 S. 578).

Defective verification. if there is no reason to suppose that any one is prejudiced thereby. is no ground, at an appellate stage. either for returning the plaint for amendment or for refusing relief on the basis of the alleged defect in the plaint. (18 All 396: 22 All 55 Fol.) **Ram Komal Saha v Bank of Bengal of Akyab.** **5 C W N 91.**

(4) Defects in signing etc of plaint.

1204—C P C S. 99=(1882 S. 578).

Per Curiam—That the defects. in the signing and verification of the plaint. cured by S. 578. **Rakhal Chandra v The Secretary of State.** **10 C W N 841=8 C L J 34.**

(5) Death of next friend pending appeal by minor—Omission to appoint new next friend mere irregularity.

1205—C P C S 99=(1882, S. 578).

(2) Irregularities in proceedings—*Contd.*

Death of next friend pending appeal by minor —Omission to appoint new next friend mere irregularity within.

3 A L J 81=A W N 1906. 40=28 All 328.

(6) Marriage—Husband and wife—Restitution of conjugal rights—Minor wife—Restitution to caste—Conditions of relief.

1206—C P C S. 99 (1908)=S. 578 of 1882.

In a suit for restitution of conjugal rights, where the validity and legality of the marriage is one of the most essential points in issue, no presumption arises from the mere fact that the marriage was celebrated, that all the rights and ceremonies necessary to constitute a legal and valid marriage were performed. (13 Cal 140; 9 Mad 466 Ref). **Surjamoni Dassee v Kali Kanta Das** **5 C W N 195=28 Cal 37.**

(7) Misjoinder of Causes of Action—Irregularity.

1207—C P C S. 99=(1882 s. 578).

The appellate Court is debarred under S. 578 from setting aside a decree on the ground of misjoinder of causes of action. **Rup Narain v Gopal Davi.** **36 Cal 780=19 M L J 548= 11 Bom L R 833=10 C L J 58= 13 C W N 920=6 A L J 567 P C.**

Notes—The new section is in confirmity with this ruling.

(8) Irregularity.

1207A—C P C S. 99 (1908)=S. 578 (1882)—Disposal of a suit on a Sunday.

Held, that the disposing of a civil suit on a Sunday is a mere irregularity which is covered by the provisions of s. 578 of the Code of Civil Procedure. (9 All 366 and 16 W R C R 230 ref to) **Sheo Ram Tiwari v Thakur Prasad.** **1907 A W N 168=29 All 562.**

(9) Sunday, Proceedings on.

1207B—C P C S. 93 (1908)=S. 578 (1882) —Whether void—Lord's Day Act—Application to India—C P C S. 578.

A Munsif went on an inspection on Sunday.

While there, the parties entered into a compromise which was recorded by him and a decree passed on the spot. *Held*, that the proceedings

(2) Irregularities in proceedings—*Contd.*

of the Munsif were not vitiated by the fact that they were taken on a Sunday. Lord's Day Act does not apply to India. (7 M H C R 285, Ref.).

Sheoram Tiwari v Thakur Prasad. 5 A L J 106=A W N (1908) 43= [illegible] M L 7 21·1=30 All 136.

(10) Misjoinder of causes of action—Substainability of plea in second appeal—Applicability to suits and appeals instituted before Act V of 1908 came into force.

1208—C P C 1908 S. 99=S. 578 (1882).

A and B obtained two separate money-decrees against C and attached certain properties in execution thereof. When the properties were attached by A, the three plaintiffs and the 4th defendant, the children of C, put in [illegible] claim-petition on the ground that the properties belonged to their deceased mother. No such claim-petition was put in when [illegible] attached these properties. The suit for declaration that the attachments made by A and B are not valid, was dismissed by the Munsiff but was decreed by the Sub-Judge. *Held*, that the objection that the suit was bad for misjoinder of causes of action cannot be heard in second appeal.

S. 99 of the new Code provides that "no decree shall be reversed or substantially varied on account of any misjoinder of parties or causes of action." That section is one regulating the procedure of the appellate Court and was therefore applicable to all appeals heard after the new Code came into force.

The circumstance that the suit or appeal was instituted before Act V of 1908 came into force does not affect the applicability of S. 99 of the new Act.

That the plea of misjoinder of causes of action had been upheld in the Court of first instance and only failed in the first appellate Court is also immaterial in determining the applicability of S. 99.

The declaration granted by the Subordinate Judge that the entire attachment of the suit properties was invalid was bad in law, [illegible] plaintiffs were only three out of the four persons entitled to the property and the order on the claim petition against the 4th defendant had become final

(2) Irregularities in proceedings—*Contd.*

no suit having been brought within one year from its date. (34 Mad 55 Appr 7 M L T 296 doubted; 1910 M W N 640; 1910 M W N 719; 33 Mad 241 Ref. 20 M L J 344 Fol.) **Tejmal Sowcar v. Jaggupilla Papayamma. (1912) 1 M W N 50; 11 M L T 25=22 M L J 225.**

See Also Cases under.

Misjoinder of plaintiffs and causes of action.

(11) Munsiff instead of recording the evidence in full in the language of the court, recorded in English [illegible] it was [illegible] suit for rent—Mere irregularity.

1209--C P C S. 99=(1882 s. 578).

Where in [illegible] suit for ejectment by [illegible] landlord against [illegible] tenant the Munsiff instead of recording the evidence in full in the language of the Court which he was bound to do, recorded the evidence in English as it was a suit for rent.

Held that this was a mere irregularity which was cured by the provisions of s. 578 C P C. **Ratan Lal Gir v. Farshi Bibi. 34 Cal 396 =11 C W N 826.**

(12) Admissibility of document not produced with plaint– Document on which the suit is based– Prejudice by reception at late stage

1209A--C P C S. 99 (1908)=S.578 (1882), O. 7, rr 17, 18 (63, 63, 578).

When a Court erroneously holds that a suit is based really upon one document, in the present case, a day book, and not upon another, a ledger, and erroneously holds that the day-book ought to have been produced along with the plaint, it cannot be said that the Court has refused to exercise [illegible] jurisdiction vested in the Court by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. (1884 11 Cal 6 (P C) ref. to and foll.) An appellate Court cannot, in view of the provisions of S. 578 of the Code, reverse the decision of the Court of first Instance on account of any error, defect or irregularity, whether in the decision or in any other order passed in the suit or otherwise, which does not affect the merits of the case or the jurisdiction of the Court. (1869) 13 M I A 181 (1882) 4 Mad 417 and (1885) 8 Mad 373

C P C (1908) S.99=(1882 S.578)-*Concld*

(2) Irregularities in proceedings—*Concld.*

ref. to and foll.). An appellate Court cannot, in view of the provisions of S. 578 of the Code, reverse the decision of the Court of first instance on the ground that leave ought not to have been granted for the reception of a document at a late stage of the case, which has affected the merits of the case, or has prejudiced the trial, or that, by reason of the delay in the production of the document, there was [illegible] well founded ground for suspicion that the document was not genuine and reliable and that leave ought not to have been granted. The provisions of S. 62 of the Code are, no doubt, of an imperative character and ought to be strictly followed. But regard must be had to the policy which underlies the provisions of Ss. 62 and 63 of the Code, viz., to exclude evidence as to the existence of which at the date of the suit there may be reasonable doubt, and [illegible] to the genuineness of which suspicion might rightly arise because it was produced at a late stage of the proceedings. (1884), 8 Bom 377 and (1907) 8 C L J 147 ; 12 C W N 312 ref to.) The bare circumstance that a document had been produced at [illegible] late stage of the case and had been received by the Court of first instance under S. 63 would not by itself constitute a sufficient reason for the exclusion of the document from consideration by the appellate Court. The error of the appellate Court in thus rejecting the document on that ground alone amounts to an illegal and irregular act, and by itself forms [illegible] sufficient ground to justify the interference of the High Court. (1899) 3 C W N 581. **Mewa Lal Sathu v Kumerji Jha,** **(1909) 10 C L J 33= 13 C W N 797=2 Ind Cas 946.**

C P C (1908) S. 100=(1882, S. 584).

Notes: —The section corresponds with section 584 of Act XIV of 1882. The changes introduced in this section are the substitution of the words *save where* for the words "unless when" which occurred in the old section, and the addition of the word *expressly* before the word 'provided' and the words *for the time being in force* after the word 'law'. The word "*specified*" which occurred in cl (*a*) of the old section has been omitted. The other changes are mere verbal, and no change [illegible] to have been made in the meaning.

"As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of section 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense. The Committee have struck out the word "specified" in the expression "*specified law or usage*."—*See the Report of the Special Committee.*

C P C (1908) S. 100=S. 584 (1882).

See Cases under:—

(1) Landlord and tenant.

(2) Special or second appeal.

C P C (1908) S. 100 **See** C P C (1908) S. 4. **10 M L J 398.**

1210-C P C S. 100 of (1908)=S. 584 of (1882) (Act VIII of 1859, s. 372)—Decision, Interpretation of—Appeal.

By the word "decision" in section 372 of Act VIII of 1859, was meant the decree and judgment taken together, and not simply the decree unexplained by the judgment. **Indrajit Koonwari v. Chokowri Sahu.** **[illegible] L R Sup Vol 1.**

C P C S. 100—See C P C O 13 r 1. Case No. (2012.) **8 C L J 147.**

—S. 100—Grounds for second appeal.

See C P C (1908) O 41 r 22 Case No. (3123). **A W N (1881) 88.**

—S. 100—Contents, date, and signature of judgment.

See C P C (1908) O 41 r 31 Case No. (3152). **13 C W N 143.**

—S. 100—Commissions to make partitions.

See C P C (1908) O 26 r 13 Case No. (2824) **5 M L T 222.**

1211-C P C S. 100 of (1908)=S. 584 of (1882) --Construction of—"May".

The word "may" in Act VIII of 1859, section 372, does not imply "by some possibility," but means "may not improbably." **Ram Chunder Chowdhry v Kashee Mohun.** **21 W R 57.**

C P C S.101 of (1908)=S.585. of 1882.

See Special or Second Appeal – Procedure in Special Appeal.

C P C S. 102 (1908)=(1882 S. 586).

1 **Original character of suit or appeal (1212-1215)**

2 **Special Cases** (1216-1219).

(1) **Original character of suit or appeal.**

1 Second appeal in execution in a suit of Small Cause nature 1212

3 Provincial Small Cause Courts Act—Suit of a small cause court nature—Second appeal—High Court 1213

C P C (1908) S.102=(1882 S.586)-*Contd*

- [illegible] Second appeal—Pecuniary limit 1214
- 4 Suit to recover books and money cognizable by a Court of small causes—Second appeal—Valuation for fiscal purposes & for jurisdiction to be determined by the value put by plaintiff 1215

2 **Special Cases.**

- 1 Small Cause decree—Execution—Order in execution—Appeal—Second appeal 1216
- 2 Landlord and tenant—Propriety of the pattah tendered and rent-Amount below Rs 500—Nature of suit-Second appeal 1217
- 3 Suit for rent—Question of title—Second Appeal 1218
- 4 Money paid out of Court by judgment-debtor——Maintainability——Assets realised in execution——Maintainability 1219

C P C (1908) S. 102=S. 586 (1882) (Act XXIII of 1861, s. 27).

See Cases under:—

- 1 Appeal orders. Case No. 1898 **3 All 18.**
- 2 Small Cause Court, Mofussil-Jurisdiction.
- 3 Special or second appeals-Small Cause Court Suits.

—S. 102—Applicability and scope of—

See C P C O 9 r 8. Case No.1743 **1 N L R 143.**

C P C 1908 S. 102 —— Judgment-debtor objection by-Decree-holder—Small Cause Court suit—Second appeal—Revision—Separate suit.

See C P C (1908) S. 47. Case No. (524)
8 O C 405.

C P C (1908) S. 102 —Appeal against order passed under s. 244 C P C 1882.

See C P C 1908 s. 47 Case No. (527)
11 C W N 861.

C P C 1908 S. 102=S.586-**See** Central Pro. Land Revenue Code. Case No 2.
6 N L R 117=8 Ind Cas 276

C.P.C.(1908) S.102=(1882 S.586)-*Contd*

C P C 1908 S. 102. See Special or second appeal. **25 Mad 540.**

—S. 102——Order of remand in a small cause nature.

See C P C O 43 r 1 Case No. 3171.
11 C W N 862.

1 ORIGINAL CHARACTER OF SUIT ON APPEAL.

(1) Second appeal in execution in a suit of Small Cause nature.

1212.—C P C S. 102=(1882 S. 586).

For the purpose of determining whether a second appeal lies in execution in a suit of a Small Cause nature the test is not the amount claimed in the execution proceedings but is the amount of the subject matter of the suit.

Mavula Ammal v. Mavula Maracoir.
17 M L J 376=30 Mad 212.

(2) Provincial Small Cause Courts—Suit of a Small Cause Court nature-Second appeal—High Court.

1213.—C P C S. 102 (1882 S. 586)-Act (IX of 1877) Sch I. Art 31.

The plaintiff sued to recover from the defendants Rs. 120 as the value of his share in the produce of certain lands alleged to belong jointly to him and the defendants. This right was denied in the written statement. The lower Courts dismissed the suit. On second appeal a preliminary objection was taken that no second appeal lay, as the suit was of a Small Cause nature.

Held, upholding the objection that no second appeal lay. The question of title arose incidentally and did not, therefore, remove the suit from the cognizance of the Court of Small Causes. (17 Bom 42 and 21 Bom 248 Fol.) **Kesrisang Banersang v. Naransang.**
10 Bom L R 738=32 Bom 560.

(3) Second appeal—Pecuniary limit.

1214.—C P C S. 102 (1908)=S. 586 of 1882.

Section 586 of the Civil Procedure Code contemplates rather the original character of the suit than the character which it may subsequently assume by operation of findings of the Courts.

Lakshumandas v. Anna. 6 Bom L R 731 =32 Bom. 356.

C P C (1908) S.102=(1882, S.586)-*Concld*

1 Original character of suit or appeal-*Concld*

(4) Suit to recover books and money cognizable by a Court of Small Causes-Second appeal—Valuation for fiscal purposes and for jurisdiction to be determined by the value put by plaintiff.

1215.—C P C S. 102 (1908)=S. 586 (1882).

The plaintiff, a widow of a deceased Brahmin priest, entrusted the defendant with certain books, containing the list of her husband's clients and had authorised him to carry on the business of *purohit* on her behalf and make over the proceeds to her. The suit was brought to recover those books and a sum of Rs. 60 which had been raised by the defendant from the *jujmans*. The valuation of the suit was below Rs. 500.

Held, that the suit was of a nature cognisable by a Court of Small Causes as it was one for the recovery of moveable property and money and consequently a second appeal would lie. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff upon it in the plaint not only for fiscal purposes but also for purposes of jurisdiction. Where the value is below Rs. 500, S. 586 of the Code forbids the entertainment of a second appeal. **Hans Raj v Ratani alias Jwala Dei.**

27 All 200=1904 A W N 227.

(2) SPECIAL CASES.

(1) Small Cause decree-Execution—Order in execution-Appeal-Second appeal.

1216.—C P C S.102=(1882 Ss.586,244)-Transfer to regular Court.

Where a Small Cause Court decree was sent for execution to the regular Court of the District and an order was passed under S. 244 C P C by the Court which was a Court of a Sub-Judge.

Held:—That an appeal lay to the Court of District Judge against such order. But the value of the decree being less than Rs. 500 a second appeal was barred by S. 586 C P C. **Peary Lal Singh v Radha Nath Singh, 11 C W N 861.**

(2) Landlord and tenant Proprietry of the pottah tendered & rent-amount below Rs. 500-Nature of suit-Second Appeal.

1217 —C P C S. 102=(1882 S. 586)—Suit by landlord for a declaration as to the propriety of the pattah tendered and rent—Civil Procedure Code (1882) sec 586.

C P.C (1908) S 102=(1882,S.586)-*Concld*

2 Special cases—*Concld.*

Where a landlord brought a suit for a declaration as to the property of the pattah tendered by him to his tenant and also for the recovery of the amount of rent due by the tenant, which was below Rs. 500.

Held, by the Full Bench that as the plaintiff could have obtained all the reliefs he sought in his suit without asking for a declaration, the prayer in the plaint for a declaration did not prevent the suit being of the nature cognizable in Courts of Small Causes within the meaning of sec 586 of the Code of Civil Procedure 1882, and that consequently no second appeal lay to the High Court in such cases. **Ramachendraiyar v Mir Muhammad Noorulla Sahib.**

1 M L T 314=16 M L J 477=30 Mad 101.

(3) Suit for rent—Question of title—Second appeal.

1218—C P C S. 102 (1908)=S. 586 of 1882. —Suit for rent—Question of title-Second appeal.

10 M L T 500.

(4) Money paid out of Court by judgment-debtor—Maintainability—Assets realised in execution——Maintainability.

1019—C P C S. 102-Money paid out of Court by judgment-debtor to one of the decree-holders, if assets realised in execution—Maintainability of appeal.

15 C L J 49.

C P C 1908 s 103

Notes:—" As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of s. 103. Experience has shown the desirability of this clause the effect of which will be to avoid remands, with their consequent delay and expense ". **See** the report of Special Committee.

1220—C P C S.103,1908.-Practice-Point taken in appeal but, not referred to by Lower Appellate Court-Power of Court in second appeal to consider the evidence on the point.

Where a point was taken in the grounds of appeal, but the Lower Appellate Court made no reference to the question, the High Court can in second appeal consider the evidence on the point under s. 103 C P C. **Chella Nagi Reddi v Javipothula Venkata Reddy.**

5 M L T 288.

C P C (1908) S. 103-*Concld.*

1291—C P C S. 103—Minor—Effect of decree against minor where property represented—Absence of order appointing guardian ad litem—Exparte decree—Whether second suit maintainable.
9 A L J 653.

C P C S 104

Notes:—This section is new. The general rules with regard to appeals from orders have been summarised in this section, and the detailed provision relating to appeals from orders are to be found in Order XLIII, rule 1.

As regards a finality of decrees passed in accordance with the award of arbitrators. See the second schedule.

"As regards appeals from orders [illegible] comparison of this sec. with S. 88 of the Code of 1882, would support [illegible] *prima facie* inference that the right of appeal from orders had been materially curtailed. But this inference is dispelled on looking at sub-s. (i) of section 104, which allows an appeal from any Order made under Rules from which [illegible] appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these Orders and our conclusion is expressed in the Rules themselves."—*See the Report of Special Committee.*

"Clause 104 sub-section (1) (b) has been added in order to give [illegible] right of appeal against the decision of the Court on a special case. This is in accordance with the recommendation of the Special Committee"—*See the Report of Select Committee.* The provisions with regard to Special case are to be found in s.90 and in Order XXXVI rules 1 to 5 of the First Schedule.

C P C (1908) s 104=s 588 of C P C (1882)=C P C 1859 ss. 363, 364 and 365

See Cases under—

1 C P C 1908 O. 43 r. 1
[illegible] Appeal—Arbitration.
3 Appeal—Orders.
3A Exparte cases.
4 Letters Patent High Court cl. 15.
4A Execution of decrees—Orders.

C P C (1908) S.104=(1882,S.588)-*Contd*

5 Letters Patent High Court-N W P cl. 10.
6 Remand—Cases of appeal after Remand.
7 Special or Second appeal—Orders subject or not to appeal.
8 C P C 1908, O. [illegible] r. 5. **5 Bom L R 980=28 Bom 162.**
9 Letters Patent High Court Bombay, **11 Bom L R 245=2 Ind Cas 150.**
10 Letters Patent High Court 1865 N W P. **1 Ind Cas 137.**
11 Parties to suit **A W N 1896, 101.**
12 Practice and Procedure. **1 A L J 695.**
13 Bengal T. Act s. 106. Case No. 398 **36 Cal 510.**
14 Bengal T. Act s. 109 A. Case No. 413 **7 C W N 440.**

C P C 1908 S. 104

See C P C 1908, [illegible] 2 cl. 14. Case No. 57
15 C W N 862.

C P C 1908 S. 104—Appeal from an order made on application for appointment of [illegible] Commissioner.

See C P C 1908 s. 47. Case No. 533
17 M L J 144.

C P C S. 104 1908—Sale in execution collusion—Material irregularity—Second appeal.

See C P C 1908 s. 47. Cas No. 513.
2 Ind Cas 983.

—S. 104 (1908)—Appeal from orders—Order of execution Court for imprisonment of judgment-debtor—Appeal—Revision.

See C P C 1908 s. 55. Case No. 975.
69 P R 1895.

C P C 1908, S.104 See C P C 1908 S. 2. Case No. 11.
24 All 342.

C P C 1908 S. 104—Interpretation—Setting aside sale order under s. 244.

See C P C 1908 s. 47. Case No. 146.
8 O C 254.

C P C S.104—Plaint insufficiently stamped—Power of Court to extend limitation.

See C P C O. 7 r. 11.
4 Ind Cas 492.

C P C (1908) S.104—Appeal from an order refusing to set aside the order dismissing [illegible] application for setting aside the sale in default. **See** C P C (1908) S. 141, Case No. (1345).

10 O C 353.

C P C (1908) S. 104 — Secretary of State added as party—Want of notice — Dismissal of suit—Appeal of Court to treat it as one in revision. **See** C P C (1908) S. 80, Case No. (1094).

1896 P J 129.

C P C (1908) S. 104—See C P C (1908) S. 96, Case No. (1171). **4 A L J 683.**

C P C (1908) S. 104—See C P C (1908) S. 95, Case No. (1168). **24 Mad 62.**

C P C (1908) S. 104—See C P C (1908) S. 95, Case No. (1167). **28 All 81.**

C P C (1908) S. 104—See C P C (1908) S. 106, Case No (1243). **15 C P L R 62.**

C P C (1908) S. 104—See C P C (1908) S. 107 (3), Case No. (1347). **25 All 174 F B.**

C P C (1908) S. 104—See C P C (1908) S. 2 cl. 2, Case No. (28). **3 C L J 276.**

C P C (1908) S. 104—See C P C (1908) S. [illegible] cl. 2, Case No. (29). **6 C L J 214.**

C P C (1908) S. 104—See C P C (1908) S. 2 cl. 2, Case No. (19). **33 Mad 220.**

C P C (1908) S. 104—See C P C (1908) S. 2 cl. 2, Case No. (25). **8 C W N 313.**

C P C (1908) S. 104—See C P C (1908) S. 2 cl. 2, Case No. (31). **A W N (1890), 85.**

C P C (1908) S. 104—Auction-purchaser.—**See** C P C (1908) S. 47, Case No. (894).

9 Ind Cas 472.

C P C (1908) S. 104 cl. (1)—Auction—Sale. **See** C P C (1908) S. 47, Case No. (520).

[illegible] Ind Cas 573.

C P C (1908) S. 104—Whether appeal lies. **See** C P C O. 9 r. 8, Case No. (1771).

8 C W N 313

C P C (1908) S. 104—Whether appeal lies. **See** C P C O. 9 r. 8, Case No. (1766).

83 P R 1902.

C P C (1908) S. 104 — Appeal against an order of the District Judge; dismissing the suit. **See** C P C O. 17 r. 3, Case No. (2131).

10 O C 245.

C P C (1908) S. 104— Dismissal of former suit for default — Appeal from dismissal order. **See** C P C O. 9 r. 9, Cases Nos. (1818, 1819).

10 O C 353 ; 6 Ind Cas 148.

C P C (1908) S. 104 — Dismissal of former suit for default — Appeal from dismissal order. **See** C P C O. 9 r. 9, Cases Nos. (1815, 1821).

A W N 1899, 44 ; [illegible] All 596.

C P C (1908) S. 104—Summons not duly served. **See** C P C O. 9 r. 6, Case No. (1730).

6 A L J 45.

C P C (1908) S. 104—See C P C O. 9 r. 7, Case No. (1739). **2 N L R 179.**

C P C (1908) S. 104—Court's inherent power to set aside exparte decree—**See** C P C O. [illegible] r. 13, Case No. (1953). **30 Mad 54.**

C P C (1908) S. 104—Appeal against orders in this section—**See** C P C O. 9 r. 13. Case No. (1937).

13 M L J 308.

C P C (1908) S. 104—Appeal against orders in this section—**See** C P C O. 9 r. 13, Case No. (1931).

3 C L J 271.

C P C (1908) S. 104—Effect of setting aside [illegible] exparte decree—**See** C P C O. 9 r. 13, Case No. (1907).

21 Mad 324.

C P C (1908) S. 104—Second appeal — Sale petition to set aside—Fraud alleged not proved—Sale set aside for irregularity. — **See** C P C (1908) S. 47, Case No. (515). **[illegible] Cal 4.**

C P C (1908) S. 104—See C P C (1908) S. 2 cl. 14, Case No. (54). **31 Mad 157.**

—S. 104—Dismissal of appeal for appellant's default.

See C P C O 41 r. 17 Case No. 3075.

A W N 195 140.

—S. 104—Appeal treated [illegible] an application for revision.

See C P C O 41 r 19 Case No. 3100.

5 P R 1900.

—S. 104—Re-hearing of application of respondent against whom exparte decree is made.

See C P C O 41 r 21 Case No. 3106.

7 C L J 426.

—S. 104—Amendment of plaint.

See C P C O 43 r 1 Case No. 3162.

59 P [illegible] 1896.

—S. 104—Returning plaint.

See C P C O 43 r 1 Case No. 3163.

15 P R 1898.

—S. 104—Order setting aside [illegible] exparte decree, no appeal lies from.

See C P C O 43 r 1 Case No. 3165.

103 P [illegible] 1905.

—S. 104—Appeal against order dis-allowing application.

See C P C O 43 r 1 Case No. 3169.

126 P L R 1903.

—S. 104—Appeal from [illegible] order of remand.

See C P C (1908) O 41 r [illegible] Cases Nos. (3139). (3142), (3143).

5 A J 447; 32 Cal 1023; 4 A L J 569.

—S. 104—Order of remand in a suit of small cause nature:

See C P C O 43 r 1 Case No. 3172.

[illegible] Cal 324.

—S. 104—Receiver's account's order in passing—Appeal.

See C P C O 43 r 1 Case No. 3170.

35 Cal 568.

—S. 104—Appointment of receivers.

See C P C O 40 r 1 Case No. 2937.

35 Cal 568.

—S. 104—Erroneous order of remand.

See C P C O 41 r 23 Case No. (3132).

28 Cal 324.

—S. 104—Procedure at first hearing.

See C P C O 35 r 4 Case. No. 2914.

30 All 22.

—S. 104—Appointment of receivers.

See C P C O 40 r 1 Case No 2935.

31 Cal 495.

—S. 104—Procedure in case of death of one of several defendants or of sole defendent.

See C P C O 22 r 4 Case No. 2750.

25 All 206.

—S. 104—Appointment of receivers.

See C P C O 40 r 1 Case No. 2936.

33 Bom 104.

—S. 104—Pro-cedure in case of death of one of several plaintiffs or of sole plaintiff.

See C P C O 22 r 3 Case No. 2741.

27 Bom 162.

—S. 104—Finality of award.

See C [illegible] C sch II [illegible] 15 Case No. (3225).

3 A L J 168.

1222—C P C [1908] S. 104, O. **41** r. **21**; O. 43 r. 1=C P C [1882] Ss. 560,588—Applicability—Whether Rent Recovery Act X of 1859 [illegible] complete Code:—

S. 560 of the Code of Civil Procedure, and by necessary implication S. 588 also, are applicable to appeals under Act X of 1859 by the operation of S. 161 of the Act. *Quære*—Whether the proposition that Act X of 1859 is a complete Code in itself, requires modification in view of the decision in 1 All 174.—**Hari Krishna Mahanti v. Bhusan Chandra Mahanto, 7 C L J 426= 12 C W N 898=35 Cal 799.**

1223.—C P C S 104 cl 1(f) sch 2, r **21** (1) and (*2*)—Appeal—Order filing an award—Decree based thereon—Provisions of the Code whether antagonistic—Intention of Legislature.—

An appeal lies, under s. 104 (f) of the Code of 1908, from an order filing an award made in [illegible] arbitration without the intervention of the Court in spite of the fact that the Court has, under cl. 21 (*1*) of the second schedule to the Code, proceeded to pronounce judgment according to the award-Per Reid C.J., and Kensington, J.—The language of [illegible] 104 (f) is very clear and the fact that a later provision of the Code cl 21 [2], sch II, bars an appeal from a decree based on an award does not cancel the earlier provision. The two provisions of the Code are not antagonistic. If the order filing an award is set aside, there is no award on which judgment and decree can be based. The absence of any ground, such as is mentioned or referred to in cl 14 or cl 15 of sch II, is a condition precedent to passing an order filing the award. (33 Cal 757=3 C L J 450 =10 C W N 609, 27 P R 1910 Cr=69 P L R 1910=22 P W R 1910. Cr=6 Ind Cas 736, 1 P R 1908 F B=58 P W R 1907 Dist). Per Rattigan J.- The two provisions of the Code are all for practical purposes in direct conflict. The result of allowing an appeal from order filing an award is tantamount to allowing an appeal from the decree based on the award. The intention of that Legislature expressed in cl 21 [2], sch II, is to all intents and purposes nullified by the provision in cl [f] of s 104. The intention of the Legislature is to allow an appeal from the order filing an award merely when such order dealt with objection that the matter had not been referred to arbitraiion or that no award had in fact been passed. **Ram Ditti v Amar Singh 172 P L R 1911.**

1224.-C P C S 104 cl 2 (1908)-Order passed in appeal—Appeal against such order—Bar—Application to set aside exparte decree dismissed—Appeal.

Where an appeal was preferred against an appellate order passed by a District Judge, who set aside the order of the District Munsif, on the ground that an amendment in the Limitation Act cannot take away the right to obtain reliefs which had become already vested prior to the amendment. *Held*, that the appeal was barred under s 104 [2], Civ Pro Code, 1908. **Venkatachellaya v Subramania Aiyar. 21 M L J 442=9 Ind Cas 55.**

1225.—C P C S. 104, cl. 2 (1908), O 43 r. 1 ss 106, 105 [=ss 588,589 591 Civ Pro Code, 1882] —Limitation Act XV of 1877 sch II arts 10 and 120—Pre-emption suit-Oral sale—Physical possession.—

An order passed in an appeal presented under s 588 of the Civ Pro Code is final. (24 Mad 447 Fol.; 89 P R 1891, 18 Bom 35 Ref.) S 591 of the Civ Pro Code provides for appeals from decrees attacking the correctness of orders which are not appealable under s 588 or which have not been appealed under that section. (20 All 42 Ref;)The words "physical possession" in art 10 of the second schedule of the Limitation Act mean personal and immediate possession. A suit for possession of joint and undivided share in land by right of preemption upon an oral sale is governed by Art 120 of the second schedule of the Limitation Act.

Kishen Chand v Kehr Singh. 140 P L R 1904=14 P R 1904.

1226.—Ss 104 cl 2 O 43 r 1, 116 S 588 —Appeals, Final—Whether revision lies—Punjab Courts Act XVIII of 1884 as amended—S 70 (*a*) Revision—Civil Cases—Jurisdiction of Court—Place where defendant actually and voluntarily resides—Defendant confined in Jail under sentence of imprisonment for life—Order returning plaint for presentation in proper Court—Revision of order dismissing appeal filed under S 588 (6) C P C 1882:—

Orders passed on an appeal against orders detailed in S 588 of the Civil Procedure Code are "final" and not open to appeal, but in a revision it is competent to remedy grave injustice and the exercise thereof is not to be refused merely because an appeal may eventually lie from the decree in the suit. **Ram Labhaya v Bishan Das 10 P L R 484.**

1227.—C P C S 104, O 43 r 1 O 39 r 2 Ss 588, 493—

A filed a petition to commit B for disobedience to an injunction. The first court dismissed the petition. On appeal under s 588 C P C, the lower appellate court reversed the order and remanded the petition to the Munsif. *Held*, that every order under S 588 is final, and no appeal lay. **Venkatapathi Naidu v. Tirumali Chetti. 24 Mad 447.**

1228.—C P C S 104 cl 2 (1908)=S 588 of 1882. How far controlled by S 588 C P C,—S 588 of the Civil Procedure Code does not take away the right of appeal given by Cl 15 of the Letters Patennt. **Secretary of State v Jehangir. 4 Bom L [illegible] 342.**

1229.—C P C s 104;cl 2,O 43 r 105 s 108,1908=Ss 588 591 do not govern Letters Patent Art 15:- Ss 588 and 591 of C P C do not restrict Art 15 of Letters Patent. **Sabhapathi Chetti v Narayanasami Chetti. 11 M L J 346.**

1230—1231—C P C s. 104 cl 2 (1908) O 43, r 1 (=Civ. Pro. Code, 1882, s. 588)—Letters Patent, s.15— Orders passed in appeal under s. 588-"Final," meaning of, appeal from such order-Judgment of single Judge of the High Court.—

C P C(1908) S.105=(1882, S.591)-*Contd.*

The word "final" in the concluding sentence of s. 588 of the Code is not used in the sense that it is not subject to review by the same Court or to revision by the High Court or to appeal to His Majesty in Council under s. 595 of the Code. It is used in the section simply in the sense that there shall be no second appeal to a Court of a higher grade, and in this view, it is not consistent with the provision made by s. 15 of the Letters Patent in appeals from the judgment of one Judge of the High Court to the High Court. Consequently an appeal lies under s. 15 of the Letters Patent from an order passed by a single Judge of the High Court under s. 588 of the Code. **Muthuvaien v Periasami Iyen.**

13 M L J 497.

1232-1233—C P C S.104;O 43 r 1 (1882 s.588) From orders—Maintainability after disposal of suit.—

The right of appeal given by S. 588, C P C from orders specified in that section ceases with the disposal of the suit. **Madhu Sudan Sen v. Kamini Kant Sen.**

9 C W N 895=32 Cal 1023.

Notes—Ref: 6 C L J 547; 7 C L J 553; 12 C W N 590; 36 Cal 762. Fol: 4 A L J 569; W N (1907) 234; 10 C L J 113; 29 All 659; 7 C L J 107; 30 All 191=(1908) W N 76=5 A L J 270. Diss: 30 All 479 F B=(1908) WN 195=5 A L J 447.

C P C (1908) Ss 105, 108=Ss 590-591 (1882)-

See Cases under;—

(1) C P C (1908) S. 108.

(2) Remand—Cases of appeal after remand.

C P C (1908) S. 105—See C P C (1908) S. 104. Case No (1225). **140 P L R 1904.**

C P C (1908) S. 105 (1)—See C P C (1908) S 104. Case No (1229) **11 M L J 346.**

—S. 105— Applicability and Scope

See C P C O 9 r 9. Case No 1776.

U B R 1897, 287.

C P C (1908) S.105=(1882,S.591)-*Contd*

—S.105—Dismissal of former suit for default Appeal from dismissal order. **See** C P C O 9 r 9. Case No 1822. **7 A L J 675.**

—S 105—Court's inherent power to set aside exparte decree. **See** C P C O 9. r 13 Case No 1959

8 C L J 308.

—S 105—Court's inherent power to set aside exparte decree. **See** C P C O 9. r 13. Case No 1954.

7 A L J 588.

—S 105—Appeal against order in this section. See C P C O 9. r. 13 Case No 1937.

26 Mad 104.

—S 105— Effect of setting aside an exparte decree. **See C P C O 9. r 13 Case No 1905.**

9 C W N 584.

—S 105—See C P C O 9. r 7 Case No 1739.

2 N L R 179.

—S. 105—Order setting aside exparte decree.

See C P C O 43 r 1 Case No. 3164.

25 All 280.

—S. 105—Order for re-admission to the decree.

See C P C O 41 r 19 Case No. 3102.

24 All 464.

—S. 105—Order of remand in a suit of Small Cause nature.

See C P C O 43. r 1 **Case No. (3172)**

28 Cal 324.

—S. 105—Erroneous order of remand.

See C P C (1908) O 41 r 23 Case No. (3132).

28 Cal 324.

—S. 105—Powers of Courts in remand cases.

See C P C (1908) O 41 r 23. Case No. **(3133)**

32 Mad 318.

—S. 105—Detention, preservation inspection of subject-matter of suit.

See C P C O 39 r 7 Case No. 2929.

2 S L R 22

—S. 105—Finality of award.

See C P C (1908) Sch II [illegible] 15. Case No (3225).

3 A L J 168.

—S. 105—Appeal from an order of remand.

See C P C (1908) O 41 r 23. Case No (3142).

32 Cal 1023.

1235—C P C (1908) S 105=S. 591 Appeal—"Any such order."

Held that the proper construction of the words "any such order" in S 591 of the Civil Procedure Code, is to take them as referring to the words " any order passed by any Court in the exercise of its original or appellate jurisdiction " and not merely to the orders against which no appeal is provided. **Mussammat Jatan v Hira Nand.** **156 P R of 1883.**

1236—C P C—S. 105 (1) (1882 S.591).

"Order affecting the decision of the case"—Order setting aside exparte decree:—"Order affecting the decision of the case " means an order affecting the decision on the merits. An order setting aside an *exparte* decree is not such an order. (32 Cal 981; 24 All 464 followed). **Tassadduq Hussain v Hayat-un-Nissa.** **1903 A W N 39 =25 All 280.**

Notes.—Fol:9 C W N 584;3 A L J 30=1 M L T 52=[1905]W N 274;8 C L J 308.

1237—C P C—S. 105 [1]—Application for decree absolute—Extension of time, question of —One 'affecting the decision of the case'—Ground of appeal.

Where a mortgagee applies for a decree absolute, but is opposed by an application for extension of time, the question whether time should be granted or not, and, if granted, on what term, is one 'affecting the decision of the case' within the meaning of s.105 [1], Civ. Pro Code, 1908, and may be urged as a ground of objection in an appeal from the final decree. [22 Cal 981, 9 C W. N, 584, 25 All 280, 24 All 454, 2 N. L. R. 179, 2 N. L. R. 137, 3

N. L. R, 55, [illegible] N. L. 146, Ref.] **Pandar v Mahadeo.** **7 N L R 162.**

1238—C P P—S. 105, O. 41 r. 23(Ss. 591,562] —"Decree", meaning of—Jurisdiction of lower appellate Court to review its own order of remand —Jurisdiction of second appeal Court to go into the legality of the order of remand, when it has become final:

"Decree" in S. 591 means a decree passed by the Court which made the order alleged to be erroneous, defective or irregular, and consequently an order of remand cannot be questioned by the same Court when the case comes on a second time on appeal after a decision on remand: nor is the High Court competent to question the legality of the order of remand by the first appellate Court in second appeal from the final decree, the original order of remand not having been appealed against. **Subba Lakshmamma v Venkatarayadu.** **32 Mad 318=5 M L T 75= 2 Ind Cas 525.**

Notes:—Doubted: 7 M L T 93.

1239—C P C S. 105—Ground of appeal from interlocutory order in appeal from final decree.

S.591, C.P.C.(Act XIV of 1882) allows an appeal from a final decree though it is solely confined to an objection to an interlocutory order disallowing a petition for amendment of the plaint. **Thimma Nayanim v Venkata Cherlu.**

(1910) 20 [illegible] L J 805.

1240—C P C S. 105—O. 41, rr. 17, 19=[1882 Ss. 59, 556, 558].

Appeal-Order for re-admission of appeal dismissed for default not capable of being used by appellant as a ground of objection to the decree. An order under S.558 of the Code of Civil Procedure re-admitting an appeal which had been dismissed for default under S. 556 is not appealable; neither is it an order affecting the decision of the case which may be set forth as ground of objection in the memorandum of appeal from the decree in the suit within the meaning of S.591 of the Code. **Gulab Kunwar v Thakur. 1902 A W N 136= 24 All 464.**

Notes.—Fol 25 All 280; 9 C W N 351.

1241—C P C S.105 O.47, rr 7, 9.Ss.591,629,623, 584)—Appeals from final decree—Objections to be taken, limit to— Review granted for "any other sufficient reasons"—No appeal.

S 584 and 591, C. P. C., do not control S. 629, C.P.C.,so as to confer a right of appeal in a case where the appeal is not based on one of the objections mentioned in S. 629; and consequently in an appeal against the final decree no objection against the order granting the review can be taken except on one of the grounds mentioned in S.629, C. P. C. When an application for review of judgment is granted "for any other sufficient reasons" within the meaning of S.623 C.P.C.the sufficiency or otherwise of the reason is not a good ground of appeal. **Gopala Aiyar v Ramaswami Sastrial. 17 M L J 603.**

1242—C P C—S.105[=1882, S.591]-Appeal-Remand—Appeal ostensibly from final decree but practically from order of remand.

Held, that S. 591 of the Code of Civil Procedure does not enable a litigant to avoid limitation by coming up under S.591,when the only ground of appeal is the order made under S. 562 [18 All. 19 Fol]. **Dhari Upadhia v Raushan Chaudhari. A W N 1899, 136.**

1242A—C P C—S. 105, Cl. 1 (O., C. S. 591)O. IX r 13(O. C., S.108)-Dismissal of application for default if bars appeal on same or other grounds.

The dismissal for default of an application under S. 108, C. P. C., to set aside an *exparte* preliminary decree is no bar to the decree being questioned in an appeal preferred against the final decree. The refusal of an application under S.108, C. P. C, is no bar to the trial in a subsequent proceeding of a question which the refusal of an application has not determined.Where on the failure or arbitrators to submit their award on the day fixed the Court proceeded to try the suit, and passed a decree *exparte* against the defendants: *Held*,that the dismissal of the defendant's application under S. 108,C.P.C.,for default was no bar to the appellate Court setting aside the *exparte* decree on the defendant's appeal, on the ground that the suit should not have been tried on a date on which it had not been fixed for hearing. **Golap Singh v Indra Coomar Hazra. 13 C W N 493; 9 C L J 367.=1 Ind Cas 86.**

C P C S. 106=S. 589 of 1882.

Notes:—This section corresponds with first part of section 589 of Act XIV of 1882, the only change made in the section is that the word *where* has been substituted for the word ' when. '

The proviso to S. 509, C P Code, 1882, which related to appeals in insolvency matters, has been omitted, inasmuch as the Chapter on insolvency has been repealed by the Provincial Insolvency Act (III of 1907). The old rulings have therefore become obsolete and inoperative.

C P C (1908) S. 106—See C P C S 104 Case No 1225. **140 P L R 1904.**

C P C (1908) S. 106—See C P C (1908) S. 107 (2) Case No (1247) **25 All 174 F. B.**

—S 106—Appeal treated as an application for revision.

See C P C O 41 r 19 Case No 3160. **5 P R 1900.**

1243—C P C Ss. 106, 104: O 43. r I; (1882 S 589 and 588)-"Subordinate to that Court." The expression "subordinate to that Court" as used in section 589 (a) must be construed with reference to its appellate jurisdiction.(17 Mad 377 foll.) **Ramme Lal v. Raja Gokuldas. 15 C P L R 62.**

1244—C P C s. 106 [1908=1882] S. 589. Appeal—Order rejecting an application to be declared an insolvent— District Court—High Court.

An appeal from an order passed by the first class Subordinate Judge rejecting an application to be declared an insolvent, under S. 344 of Civil Procedure Code, where the subject is Rs. 5,000 in value lies to the District Court, under S. 589 of the Code. **Manekshah Dadabhai. 5 Bom L R 591.**

1245-1246—C P C S. 106 [1908]=C P C S. 589 [1882]—Appeals from orders in insolvency proceedings—Jurisdiction.

Where an application for insolvency is made by a judgment-debtor in the course of execution proceedings in a suit instituted in the Subordi-

C P C (1908) S 106=(1882 S.589)-*Contd*

nate Court, the subject matter of which is over Rs. 5,000 in value, the appeal from the order of the Subordinate Court granting the application lies to the High Court and not to the District Court.

Held, with reference to Cl. (*a*) of S. 589, that a Subordinate Court should not be deemed to be subordinate to the District Court as regards suits the subject matter of which exceeds Rs. 5,000.

Venkatarayer v. Jambu Aiyar. 3 M L J 97.

C P C (1908) S. 107=(1882 S. 589).

Notes:—The first part of this section is new, and it contains a general provision about the powers of an Appellate Court. " We think it desirable to have in the body of the Code a general provision about the powers of an Appellate Court". *See the Report of the Select Committee.*

Sub-section (2) corresponds with the first part of section 582 of the Code of 1882 The latter part of section 582 of the same Code has been embodied in Order XXII. r. 11 The second clause of s. 582 of the Code of 1882 has been omitted.

—S. 107. (2) O. 22 r. 11=S. 582 (Act XXIII of 1861, S. 37).

See cases under:—

(1) Abatement of Suit — Appeals, Case Nos. (131A, 96, 129, 147).
7 All 693, 734; 3 Bom A C 81= 12 C L R 45=11 All 408.

(2) Appellate Court— Exercise of Powers in various Cases — Special Cases— Appeal.

(3) Appellate Court— Exercise of Powers in various Cases — Special Cases— Arbitration, Reference to.

(4) Appellate Court—Exercise of Powers in various Cases — Special Cases— Plaint, Amendment of.

(5) Limitation Act, 1877, arts. 171, 171A and 171B.

(6) Parties — Substitution of Parties— Respondents.

C P C (1908) S. 107 cl.2-See C P C [1908] O. 1 r. 10 cl.[2],Case No.[1518]. **8 C W N 404.**

C P C [1908] S. 107 cl.2– See C P C 1908 S. 35, Case No. (119). **A W N (1892), 215.**

C P C (1908) S.107=(1882,S.589)-*Contd*

C P C (1908) S 107, cl 2 O. XXII r. 11= C P C (1882) S. 582—See Court fees Act. S.28.
156 P R 1888.

C P C (1908) S. 107 — Appeal filed — The power to set aside decree vests in the Appellate Court--**See** C P C O. 9 r. 13, Case No. 1930.
30 Mad 535.

C P C (1908) S. 107, O. 22 r. 11=C P C S. 582 (1882)—See Transfer of Civil Case.
8 M L T 347.

C P C (1908) S. 107 (2) O. 22 r. 11=C P C S. 582 (1882)– See Parties—Adding parties to suits. **8 C W N 404.**

C P C (1908) S. 107—See Withdrawal of suit. **6 Ind Cas 912=12 C L J 91.**

C P C (1908) S. 107 — See Abatement of suit—Appeals, Case No. (109). **25 All 27.**

—S 107—Procedure in case of death of one of several defendants or of sole defendant

See C P C O 22 r 4. Case No 2746
26 Bom 203.

—S 107—Procedure where one of several plaintiffs or defendants dies and right to sue suvives

See C P C O 22 r 2. Case No 2738
30 P R 1880

—S 107—Application of order to appeals

See C P C O 22 r 11. Case No 2771
23 All 22

—107—Procedure in case of death of one of several defendants or of sole defendant

See C P C O 22 r 4. Case No 2779
23 All 22

—S 107—Procedure in case of death of one of several defendants or of sole defendant

See C P C O 22 r 4. Case No 2754
31 Cal 487.

—S 107— Effect of abatement or dismissal

See C P C O r 9 Case No 2761
36 Cal 418.

—S 107—Application of order to appeals

See C P C O 22 r 11 Case No 2778
26 Bom 203

C P C (1908) S. 107 = (1382 S. 589 -*Contd*

—S 107 (2)—stamp duty [illegible] memorandum of objection.

See C P C (1908) O 41 r 22 Case No 3126 **4 N L R 168**

—**S 107** (2)—Withprawal of suit or abandonment of part of claim

See C P C (1908) O 23 r 1 Case No (2789) **6 Bom L R 533.**

1247—C P C S 107 (1908) (2); O 22, r 11; S 104: O 43; r, 1 S 106 (1882 Ss. 583, 588 (6) 589)—Return of plaint by Appellate Court—Appeal.

S. 589 gives the appellate Court power to return a plaint presented in a Court of a grade lower than that of the Court competent to try it for presentation to the proper Court. An appeal lies from such [illegible] order. (*3 All 456 overruled. 21 Mad 234 and 26 Cal 276 foll.*) **Wahid-ullah v. Kanhayilal, 1902 A W N 222= 25 All 174 F B.**

Notes:—Ref: 31 Cal 344.

1248 — C P C Ss. 107, 53 (1908)=S. 582—Appellate Court's power to order amendment of plaint.

An Appellate Court has power under sec. 582 read with sec. 53 of the Civil Procedure Code to allow an amendment of the plaint. Where the object of an amendment of [illegible] plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit. (9 Cal 695 (1883); 22 Cal 692 (1895); and 20 Mad 467 (1897), referred to.) **Rajah Peary Mohan Mukherjee v Narendra Krishna Mukerjee, 5 C W N 273.**

1249—C P C S. 107 (1908) cl. 1=S. 582—Court Fee - Decree — Memorandum of appeal, amendment of—Civil Procedure Code, Ss. 53, 582 —Court Fees Act VII of 1890.—

Generally, an Appellate Court cannot pass [illegible] decree for a larger amount than that claimed in the Memorandum of Appeal, unless, before the judgment is pronounced, an amendment of the Memorandum of Appeal is allowed, and the additional Court fee paid in. **Percival v Collector of Chittagong, 30 Cal 516.**

C P C (1908) S. 107 = (1882, S. 589)-*Concld*.

1250—C P C S. 107, cl. 2, O. 22, r. 11—O. VI, r. 17, O. VII, r. 11, O. V, r. 18, O. XLI, r. 3, O. XXII, r. 11 (=ss. 2, 53, 54, 543, 582, Civ. Pro. Code, 1882) — Order rejecting memorandum of appeal—Stamp duty—Decree—Appeal.—

The terms of s. 582 of the Civ. Pro. Code, 1882, read in conjunction with ss. 53 and 54 and with the definition of "decree" in s. 2 empower [illegible] Court to reject a memorandum of appeal, not only for non-compliance with the provisions of s. 543, but inadvertence to the directions contained in ss. 53 and 54 in so far as they are applicable. An appeal lies from an order rejecting a memorandum of appeal, the order being an adjudication which disposes of the appeal finally.

Zainulabdin v. Altaf Hussain, A W [illegible] 1885, 323.

1251—C P C S. 107 cl. 2, O. 22, r. 11 and s. 107—Power and duties of an appellate Court under the section are same [illegible] are conferred and imposed on the Court of original jurisdiction. **3 C L J 29.**

C P C S. 108=S 587 of 1882.

Notes:—The first part of this section corresponds with s. 587 of the Code of 1882, with the following changes: for the words " as far [illegible] may be" in the old Code, the words "*so far as may be*" have been substituted; and the words " and to the execution of decrees passed in such appeals " contained in the old Code have been omitted.

The second part of this section, *i. e*, cl. (b) corresponds with section 590 of the old Code with some verbal alterations in the language.

The object of this section is to avoid repeating some of the provisions relating to first appeals in the chapter relating to second appeals.

C P C—S. 108 (1908)=1882 s. 587 (1859, ss. 373, 374. Act XXIII of 1861, s. 25).

See Special or Second Appeal—Procedure in Special Appeal.

C P C (1908) ss. 108, 105 (1), O. 42 r. 2=Ss. 590, 591, (1882).

See cases under:—

(1) Insolvent Act, s. 73.
(2) Remand — Cases of Appeal after Remand.
(3) C P C (1908) S. 105=S. 591 (1882).

C P C (1908) S. 108—Defendant entitled to

C P C (1908) S.108=(1882 S.587)-*Concld*

be restored to possession—Decree being reversed. **See** C P O (1908) s. 144 (1). Case No. (1383).

1887 P J 75.

—S 108—Procedure where one of several plaintiffs or defendants dies and right to sue survives

See C P C O 22 r 3 Case No 2738

30 P R 1880

1252—C P C S. 108—Failure of application under—Suit to set aside *ex parte* decree—Maintainability.—**See** **15 C L J 446.**

1253—C P C S. 108=1882 S. 587 — Special appeal — Issue of fact referred to Court of first appeal—Finality of finding.—

The District Judge in appeal reversed the decree of the District Munsiff after deciding the case on a preliminary point. The High Court in appeal against the judgment of the District Court reversed it & directed the District Court to submit its finding on [illegible] issue of fact framed & tried by the District Munsiff and not decided by the District Court. On submitting the finding to the High Court [illegible] memorandum of objections was filed under s. 567 of Civil Pro. Code.—*Held*, that the words "as far as may be" in s. 587 must be taken to mean " as far as is consistent with the principles on which appeals from appellate decrees are admitted and determined " and so objections could not be taken in second appeal on findings of the District Court under S. 567 of Civil Pro. Code. **Hinde v. Ponnath Brayan.** **7 Mad 52.**

Notes:—Not Fol: 24 Cal 98. Dist: 12 Cal 37. Ap: 9 All 147 F B.

1254—C P C S. 108=1882 S. 587—Act VIII of 1859, s. 374—Ground of appeal not taken in petition.—

S. 374 leaves it in the discretion of the Court to admit any new ground of appeal arising out of the proceedings, though it may have been omitted in the petition of special appeal.

Joykishen Mookerjee v. Rajkishen Mookerjee. **5 W [illegible] 147.**

Notes:—Ap: 20 W R 139. Dist: 11 W R 354; 12 W R 110. Fol: 3 C L J 521.

C P C (1908) S. 108.
See Cases under:—
Special or Second Appeal.

C P C S. 109=S. 595 of 1882.

Notes. This section corresponds with section 595 of the C P Code of 1882. The material changes made in this section are:—the insertion of the word *order* after the word *decree* in each of the three clauses (*a*) (*b*) and (*c*), and the omission of the word *final* which preceded the word decree from clauses (*a*) and (*b*) of the old Code.

The above omission of the word *final* will set at rest what was [illegible] somewhat debatable point [illegible] will appear from 15 Bom. 155 P C; 17 All 112 P C and 22 Cal 928.

The word '*final*' seems to have been omitted from the present Code in view of the extended definition of the word '*decree*' in section 2 (cl. 2) which includes preliminary as well as final decree. According to the old Code only the final decrees were appealable but according to the present Code both final and preliminary decrees are appealable as the present definition of the word '*decree*' includes both.

The expression 'final order' means the order by which the whole cause or suit is determined, that is, comes to an end; it does not include interlocutory order, which determines only a part of it leaving other matters to be determined. The expression " final order " therefore means an order which affects the merits of the question between the parties by determining some rights or liabilities. An interlocutory order determines only a part of the suit or cause and leaves other matters to be determined by the final decree. By interlocutory order the suit or cause does not come to an end but the trial proceeds notwithstanding the interlocutory order.

C P C (1908) S. 109; O.45 rr.2 to 13 Ss.110 111=(1882) Ss. 595 608 (Act VI of 1874 s. 4.)

See Cases under Appeal to Privy Council.

C P C (1908) S 109. Privy Council-Leave to appeal—Final & interlocutory order—Remand—Cardinal point.

See. C P C (1908) S. 47. Case No (557).

6 A L J 786.

C P C (1908) S. 109.

See. C P C (1908) S. 152. Case No. (1420)

30 Cal 679.

C P C S 109-Appeal against orders in this section—**See** C P C O 9 r 13. Case No 1940.
28 Cal 442.

1255. C P C S.109 (1908)=S 595 cl [a]-Final decree passed on appeal.

An order passed by the High Court refusing to admit an appeal presented beyond the prescribed period, is not a decree passed on appeal under S. 595 (a), C P C and is therefore, not appealable to His Majesty in Council (30 Cal 679 foll.) **Karsondas v. Gangabai.** **[illegible] Bom L R 566= 32 Bom 108.**

1256.—C P C S. 109 cl (a)—Order passed on appeal-'Final order'-application to sue in forma pauperis-'Order of Reversal'-Elements of appellate Court-Petition disclosing no cause of action.

An order passed by the High Court in the exercise of its revisional jurisdiction reversing that of the Court of first instance allowing the applicant to sue in *forma pauperis* is an order passed on appeal within the meaning of cl.(*a*) of S. 109 of the Code of Civil Procedure 1908.

Two essential elements are to be considered in deciding whether an order is passed on appeal within the meaning of clause (*a*) of S. 109 of the Code namely, (1) whether there exists the relation of superior and inferior Court and (2) whether there exists the power on the part of the superior tribunal, to review, affirm, modify or reverse the decision of the inferior tribunal.

An order of the High Court based on the ground that the allegations in an application to sue in *forma pauperis* do not disclose any cause of action is a 'final order' within the meaning of cl. (*a*) of S. 109 of the Code.

The term 'final order' denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides in effect finally the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit and therefore is an order which could never, while the decision stands, be questioned again in the suit, it is a 'final order' within the meaning of S.109 of the Code, notwithstanding that there may be subordinate enquiries to be made.

Whether the character of finality can be rightly claimed in respect of an order should be determined with reference to the precise relation in which it stands to the proceeding before the Court (13 C L J 90 Fol: 10 C L J 336 Fol.) **Harish Chandra Acharjee v. Nawab Bahadur of Moorshidabad.**
13 C L J 688 = 15 C W N 879 = 11 Ind. Cas 65.

1257.—C P C S. 109 (1908) cl (a)=old s. 595 Civ Pro Code 1882—Order returning plaint for presentation to proper Court—Meaning of final decree.

An order passed on an appeal from [illegible] order returning a plaint for presentation to the Revenue Court and reversing the latter order is not a final decree. A final decree under this section is one which finally determines some cardinal point in issue in the cause in respect of the rights of the parties and on the merits of the case. **Ganda Mal v. Thakar Harkishen Singh.**
12 P R 1896.

1258.—C P C Ss. 109 cl a. 115=(595, 622)—Leave to appeal to Privy Council-Letters Patent S. 39-Order of the High Court under S.622 C P C allowing a party to sue in forma pauperis-Power of High Court to grant certificate.

An order passed by the High Court under S. 622 C P C deciding that a party should be allowed to sue *in forma pauperis* is not a final decree passed in an appeal within the meaning of S. 595 C P C. **Babu Sakan Sing v Gopal Chandra Neogi.** **(1904) 8 C W N 296.**

1259.—C P C S. 109 (1908) cl (6)-Appeal to the Privy Council-Remand—Account taken under order of Privy Council by an Appellate Bench—Order a final decree of a Division Court-'Division Court, meaning of-Civil Procedure Code (Act XIV of 1882) Ss. 595, 596.

Where the Privy Council remanded [illegible] case to the High Court directing accounts to be taken on a certain footing an order made by [illegible] Bench of two Judges sitting on the appellate side, upon taking accounts as directed, was a final decree of a Division Court from which an appeal did not lie to the High Court under S. 15 of the Letters Patent. An appeal, therefore, lay from it to the Privy Council under S. 39 of the Letters Patent when the amount in dispute exceeded Rs. 10,000. The expression Division Court does not apply only to a 'Division Court' sitting on the original side. *Semble*-The case did not fall within Ss. 595, 596 of the Civil Procedure Code. **Guru Prasanna Lahiri v Jotindra Mohan Lahiri.** 9 C W N 556=32 Cal 963 .

1260.—C P C S. 109 (1908) cl (6)=1882 s. 595 'Final decree'-Order of remand-Suit to annul incumbrances-Bengal Tenancy Act VIII of 1885. s. 167-Notice-Dismissal of suit on the ground of non-service of notice—Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a *putni* at a sale for its own arrears was dismissed by the Subordinate Judge, on the ground that the plaintiff had failed to prove the service of notices under s. 167 Bengal Tenancy Act but the High Court on appeal held that the service of notices was proved and remanded the suit for the trial of the other issues in the case.

Held, that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case *viz* whether the notices were properly served or not. The order was therefore a final decree within the meaning of s. 595 of the Civ Pro Code (17 All 113 and 15 Bom 155,Ref). **Ananda Gossi Gossain v Naffor Chandra Pal Chowdhury.**

12 C W N 545=35 Cal 618=8 C L J 168.

Notes.—Ref 10 C L J 336.

1261—C P C S 109 cls (1) and (2)—Order appointing Receiver—Fit cases—Certificate—Discretion of Courts. Appeal to Privy council,

See 13 C L J 507.

1262—C P C S 109 cl (c); O 45 r 1 (1908)=Ss. (595) 598, (1882) —Appeal to Privy Council—Civil Procedure Code . Ss. 594. 595—" Decree "– " Fit ":—

The term "decree " in S. 594 includes an order passed by the High Court under the Memorandum of Association Act, 1895, or under the Companies Act, 1882. The High Court granted leave to appeal to the Privy Council on the grounds that the questions involved might seriously affect the financial and commercial possession of the company in question, and that it was of importance to Indian companies generally that their rights should be precisely defined in relation to the point that arose in the case.

Bombay-Burmah Trading Company v. Dorabji C. Shroff.

(1903) 5 Bom L R 348=27 Bom 415.
Also 1907 A W N 291.

1263—C. P. C. S. 109, cls. (a) and (c) and O XLI r 5—Order refusing stay of execution—' Order passed on appeal'——' Final order'—' Fit case'— Substantial loss, question of— Discretion.

An order deciding that circumstances have not been established such as would justify an order for stay of execution of a decree under appeal is not a 'final order' (but an interlocutory order) nor an 'order passed on appeal' within the meaning of cl. (a) of S. 109 of the Code of Civil Procedure.

The term 'final order' in cl. (a) of S. 109 of the Code denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties.

An order cannot be deemed to have been passed on appeal, unless it is an order passed by a superior Court, in reversal, modification or affirmance of an order of an inferior Court. To constitute appellate jurisdiction, there must exist the relation of superior and inferior Courts and the power on the part of the former to review the decision of the latter.

Clause (c) of S. 109 of the Code is intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance.

The discretion vested in the Court by cl. (c) of S. 109 of the Code is to be sparingly used.

The question, whether or not the applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to the High Court is not a question of such exceptional importance as would justify a special certificate of fitness under cl. (c) of S. 109 of the Code.

Clause (c) of S. 109 of the Code is not to be interpreted as restricted in its application to cases of 'final orders, ' precisely in the same manner as cls.(a) & (b)(10 C L J 336.Foll.) **Srinivasa Prasad Singh v. Kesho Prasad Singh.**

13 C L J 681.

C P C S. 110 =S.596 of 1882.

Notes. This section corresponds with S 596 of the C P Code of 1882. The only change introduced in this section is the insertion of the words "*or final order*" after the word" decree" in paras 2 and 3. For the meaning of the expression "final order" see notes under s. 109.

C P C (1908) S 110 = S. 596 (1882).

See Case under:—
Appeal to Privy Council.

C P C (1908) S 110. —

See C P C (1908) S 152. Case No (1420).
30 Cal 679.

C P C S. 110=1882—Ss 596-600.

See Cases under limitation Act. 1877, **Art.** 177.

1264—C P C-S. 110 (1908) = S. 596-Appealable value—" And," meaning of.

In preferring an appeal to the Privy Council, in a case which is under the appealable value, a person who asks for special leave to appeal, should first apply to the High Court for a certificate under the second part of sec. 600, that the case " is otherwise a fit one for appeal." Special leave to appeal will be given only in cases which involve a substantial question of law. The word 'and' in the first part of sec. 596 means ' and ' and not ' or.' **Moti Chand v Ganga Parshad Singh 6 C W N 362.**

1265—C P C S 110 (1908)— 110 (1882) s. 596 —Amount or value of the subject matter of the suit, meaning of—Decree involving directly or indirectly some claim or question to or respecting property.

In a suit for partition, the value of the subject matter of the suit, for the purposes of valuation under section 596 of the Code of Civil Procedure for appealing to His Majesty in Council is the value of the whole estate which it is sought to partition and merely that of the particular share which one of the parties may claim.

In such a case, the amount or value of the matter in dispute on appeal to His Majesty in Council is the value of the entire estate and not merely that of the appellant's share therein.

When therefore in a suit for partition, the value of the entire estate is ten thousand rupees or upwards, although that of the appellant's share may be valued less, the decree for partition does involve, directly or indirectly, some claim or question to or respecting property, of the amount or value of ten thousand rupees or upwards, within the meaning of the third paragraph of section 596 of the Code of Civil Procedure.

Under such circumstances where the decree appeared from is in reversal of the decree of the Court below, the case is a fit one for appeal to His Majesty in Council and a certificate should be granted accordingly. **Bhagwat Sahai v. Pashupati Nath Bose. 3 C L J 257=10 C W N 564.**

1266—C P C S, 110 (1908)=S. 595 (1882)—Partition suit—Valuation—Appeal.

In a suit for partition, the value of the entire estate and not the value of the plaintiff's share in it, is the value of the original suit within the meaning of S. 21 of Act XII of 1887. **Biraj Mohini Dasi v Chintamoni Dasi. 10 C W N 565; 3 C L J 197.**

1267—C P C S. 110=(1882 s. 596)—Several suit dealt with in the same judgment—Aggregate value exceeds Rs. 10,000.

Where although, if each case be taken separately, the value is below Rs. 10,000, yet, if taken collectively, the aggregate reaches that amount, and the cases are all dependent upon the same judgment, the case falls within S. 596 of the Code and leave to appeal to the Privy Council should be granted in each of the cases.

Deo Narain Singh v Guni Singh. 34 Cal 400.

1268—C P C S. 110=(1882 S. 596)—Privy Council appeal—Leave—Value—Libel suit—Practice—Inquiry.

The plaintiff in a suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure. Leave to appeal from an appellate judgment of the High Court dismissing, on the ground of privilege, a suit for damages for libel was refused in the view that on the finding of the Court of first instance and not reversed by the appellate Court, the plaintiff had sustained no substantial damage. Where there is a contest as to the true value of the matter in dispute, it has been the invariable practice, a practice sanctioned by the judicial Committee, to ascertain by evidence and enquiry what the true value is. **Rai Amrita Nath Mitter Bahadur v Abhoy Charan Ghosh. 9 C W N 370.**

C P C (1908) S.110=(1882 S. 596)-*Concld*

1269—C P C S.110. O 41 r 3=(1882 S.596 Cl (*c*), S. 600)—Privy Council, leave to appeal to.

Where the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000, and the decree of the High Court appealed from affirmed the decision of the Court immediately below the High Court which passed the decree, and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for His Majesty in Council, such a certificate is correct in form and satisfies the provisions of the law. Such certificate is given pursuant to S. 595, Cl [c] and the latter alternative of S. 600, C P C (*L R 30 I A 35 dist.*) **Webb v Macpherson. 13 M L J 389 =5 Bom L R 838=8 C W N 41=30 I A 238 =31 Cal 57: P C.**

Notes—Ap: 29 Mad 305. Fol: 31 Cal 505 P C. Ref: 8 C W N 225: 14 M L J 105: 27 Mad 435: 6 Bom L R 557; 33 Cal 110=10 C W N 276=4 C L J 102; 30 All 172 F B = (1908) W N 71=5 A L J 243.

1270—C P C S. 110 [596]—Application for leave to appeal to His Majesty in Council—Limitation Act, Ss. 5, 12.

Held that neither S. 5 nor S. 12 of the Limitation Act, 1877, applies to applications under S. 596 of the Code of Civil Procedure for leave to appeal to His Majesty in Council. (1 All 644: 16 All 14; 19 Bom 301 and 15 Mad 159 foll.)

Shib Singh v Gandharp Singh. [1906] 28 All 391=1906 A W N 55= 3 A L J 165.

C P C S 111.=S. 597 of 1882.

Notes—This section corresponds with s. 597 of the C P Code of 1882. The only changes made in this section are, the substitution of the words *decree or order*, for the word "judgment," which occurred in the old Code, and also the substitution of the words *Indian High Court's Act 1861* for the words "24 and 25 Vict., C 104" contained in the old Code.

C P C (1908) S. 111=S. 597.(1882).

See Cases under:—

(1) Appeal to Privy Council.
(2) Limitation Act 1877 Art 177.

C P C S. 112=S. 616 of 1882.

Notes—This section corresponds with s 616 of the C P Code of 1882. No material change has been made in this section, except the substitution of the words. *in this Code*, for the words "herein contained" and the words *herein contained* in sub section (2), for the words "in this chapter" which occurred in the old Code.

C P C S. 113=S. 617 of 1882.

Notes—This section although a new one, only summarises the general powers of Courts to make reference to the High Court. The detailed procedure relating to reference is to be found in order XLVI., rules 1 to 7 (ss. 617 to 621, 646A, 646B of the old Code).

—S. 113 O 46 r 1=(1882) s. 617 (Act XXIII of 1861, s. 28).

See Reference to High Court—Civil cases.

—S. 113 O 46 rr 1, 2, 3 and 4=1882-ss 617 618, and 619-620.

See Small Cause Court, Presidency Towns—Practice and Procedure—Reference to High Court.

C P C (1908) S. 113—See C P C (1908) S. 38, Case No 127 **31 All 1.**

C P C (1908) S. 113—Reference-High Court. **See** C P C (1908) S. 92—Case No (1159A). **25 Bom 327.**

C P C (1908) S. 113. O 46 r 1 S. 617. (1882) See Punjab—Chief Court, Reference to.

—S 113—Reference of question to High Court **See** C P C 1908 o46 r 1 Case No (3185) **7 Bom L R 995**

1271—1272—C P C S. 113 (1908) O XLVI r 1—Reference by Divisional Judge to Chief Court, when permissible—Punjab Courts Act (XVIII of 1884), ss. 40 (1) (b), 44, 70 (1) (b).

16 P L R 1905=39 P R 1905.

See Small Cause Mofussil jurisdiction of.

35 P [illegible] 1886.

1273—C P C S. 113; O 46 R 1 (1882 S. 617)—Reference—High Court.

Sections 617 and 647 Civil Procedure Code, apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding.

Section 617 was not intended to provide for suppositious cases which do not actually arise in

CPC (1908) S.113=(1882,S.617)-*Concld.*

a proper proceeding before the Court.

Mahamad v Ahmedbhai.
3 Bom L R 368=25 Bom 327.

1274—C P C S. 113 (1908) O 46 rr 1, 5 =(1882 Ss. 617, 621).

Presidency Small Cause Courts Act (XV of 1882), S. 69-Conditions imposed on judge of Small Cause Court in stating case for opinion—Power of High Court to remand for amendment.

Garling v Secretary of State for India.
30 Cal 458.

C P C S. 114=S. 623 Of 1882.

Notes—This section though it may be called a new one, contains only a brief statement of the Court's general power of review. the details of which are to be found in Order XLVII., rules 1 to 9 (ss. 623 to 630 old Code). Clauses (*a*), (*b*) and (*c*) of this section correspond with the first part of section 623 of the C P Code of 1882, with some modifications. All the provisions of review which contained in sections 623 to 630 of the old Code, are given in rules 1 to 9.

—C P C S. 114 (1908).

See Guardians and Wards Act 1890 ss. 7, 47.
143 P R 1906=12 P W R 1907=
105 P L R 1907.

C P C S. 114 O 47 r 1=1882 s 623 (1859, s. 376).

See [illegible] under:—

(1) Review.
(2) Small Cause Court, Mofussil-Practice and Procedure—New Trials.

C P C (1908) S. 114—See S. 115. Case No 1300. **29 All 468.**

C P C S. 114.

See C P C O 9 r 3. Case No 1698
33 P R 1909.

C P C (1908) S. 114

See C P C (1908) S. 115. Case No 1369.
28 Cal 177.

C P C (1908) S 114.—Petition to re-open execution—Receiver. **See** C P C (1908) S. 47. Case No 658 **5 C W N 627.**

—S. 114—Court's inherent power to set aside exparte decree **See** C P C O 9 r 13. Case No 1958
1 Ind Cas 136.

C P C (1908) S.114=(1882,S.623)-*Contd.*

C P C S. 114—Orders against this section are subject to review. **See** C P C O 9 r 13. Case No 1968. **7 C L J 268.**

—S. 114—Application treated as review. **See** C P C O 17 r 3. Case No 2132. **7 P L R 1910.**

—S. 114.

—See C P C O 15 r 4. Case No 2048.
A W N 1887, 105.

—S. 114.

See C P C (1908) S. 159. Case No. 1491
5 C W N 192.

—S.114—Heir's right to apply under this section. **See** C P C O 9 r 13. Case No 1833.
9 O C 35.

—S 114—Review-jurisdiction.

See C P C O 41 r 11 Case No 3047
30 Bom 625

—S 144—Production of additional evidence in appellate Court

See C P C (1908) O 41 r 27 Case No (3148)
2 M L T 435

—s 114—order of rejection not appellable.

See C P C (1908) O 41 r 7 Case No (3199)
19 M L J 56

—S 114—Raversal or modification of decree on ground, commission to all.

See C P C O 41 r 4 Case No 2989
47 P R 1904

1275–1276—C. P. C. S. 114; O. 47. r. 1: O. 47 rr. 7, 9=(1882 ss. 623-629)--Sufficient cause—Order admitting review—appeal.

Held per (Banerji, J.) that an appeal from an order admitting a review can only be brought on the three grounds mentioned in section 629, Code of Civil Procedure. The insufficiency of the reason for which an application for review is admitted is not one of the grounds upon which an appeal would lie.

Held, per Richards J , that when an appeal is dismissed on the ground that the court-fee paid was insufficient and this was subsequently discovered to be a mistake, it was a sufficient ground for admitting a review and was clearly sufficient cause within the meaning of s. 623. **Ali Akbar v Khurshed Ali** **2 A L J 465= 1905 A W N 154=27 All 695.**

C P C (1908) S.114=(1882.S.623)-*Contd.*

1277—*C.* P. C. S. 114 (1908) O 47 r. 1=(1882—S. 623)—Subsequent filing of an appeal—Jurisdiction to grant review, whether barred by—Court's duty.

Where an application for review is presented by a party and an appeal is afterwards perferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application but in such a case, the jurisdiction ought to be exercised with the greatest care and only in a very strong case. (28 Mad 310 Over: 30 Mad 535; 13 Bom 520 P C; B L R F B 362; 18 Mad 214 Ref: (1880) 14 Ch D I Appl:*)*. **Chenna Reddi v Pedda Obi Reddi 6 M L T 135 F B=2 Ind Cas 802.**

1278—C P. C. S. 114 (1918) O, 47, r. 1=(1882 s. 623)—Review of judgment—Effect of order on review—Appeal from original decree.

Where an application for review of judgment is granted, the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted; an order passed which purported merely to amend the decree then under appeal. *Held*, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. (1890 A W N 144 foll.) **Kanhaiya Lal v Baldeo Prasad. 1905 A W N 265=[illegible] All 240.**

1279—C P. C. S. 114 (1908*)*=S. 623-Ground of review—Fraud—Mistake:

The ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground of review under S. 623, C. P. C. A mistake in the matter of copying out the petition of compromise may not by itself fall within the scope of S. 623, C. P. C. but taking it with the other ground stated above, it might be good ground of review.

Rasik Chandra Choudhury v Rajani Ranjan Choudhury. 10 C W N 287.

1280—C P C S. 114; O 47, rr 1, 4, 7, 9=(1882 Ss. 623, 626, 629)—Appeal—Review of judgment—Order dismissing the rule granted—Limitation.

An application for review commences ordinarly with an *ex parte* application under [illegible] of the Code. The *Court* then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected, and it is obvious that the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If on the other hand, the rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the rehearing, the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case, the parties are relegated to and still rest on the old decree.

Vadilal v Fulchand. 7 Bom L R 664.

C P C S. 115=(1882 s 622)

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2 **High Court will not exercise revisional powers when another remedy is open 1282**

3 **Where court has jurisdiction High Court cannot interfere 1283**

4 **Gross or palpable error of law -Amount to error of jurisdiction 1284—1287**

5 **Acting illegally or with material irregularity in the exercise of jurisdiction 1288—1295**

6 **Interlocutory orders not subject to revision 1296—1298**

7 **Order granting or refusing to grant a review whether open to revision 1299—1300**

8 **Power to interfere with decrees or order passed upon an award 1301—1302**

9 **High Court's revisional powers under Presidency S. C. Court Act 1303—1308**

10 **Order amending or refusing to amend a decree on clerical error 1309**

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1 **Meaning of the word Court.** 1281

2 **High Court will not exercise revisional powers when another remedy is open.** 1282.

3 **Where Court has jurisdiction — High Court cannot interfere** 1283.

4 **Gross or palpable error of land amount to error of jurisdiction.**

- 1 Order deciding that petitioner was not representative 1284
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5 **Acting illegally or with material irregularity in the exercise of jurisdiction.**

- 1 What amounts 1288
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6 **Interlocutory orders not subject to revision** 1296—1299.

7 **Order granting or refusing to grant a review whether open to revision** 1299—1300.

8 **Power to interfere with decrees or orders passed upon an award.**

- 1 Appeal from award—Objections—Dismissal of objections-Decree in accordance with the award—Incompetency of appeal from such a decree 1301
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9 **High Court's revisional powers under Presidency S. C. Court Act.**

- 1 Revision—Petition to High Court from a decision of a Presi. Small Cause Court Judge 1303
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10 **Order amending or refusing to amend a decree or clerical error.**

- 1 Appeal—Second appeal—Review. 1309

11 **Miscellaneous Cases.**

- 1 Misconstruction of S. 87 1310
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- 6 Revisionary jurisdiction over-Talukdari Settlement—Officer 1316
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See Cases under:—

- (1) Superintendence of High Court-Civil Pro Code S. 622=S. 115 of the New Code.
- (2) Charter Act S. 15
- (3) Letters Patent cl 15

(4) Bengal T. Act ss. 15, 16 & 153
(5) Punjab Chief Court.
(6) Powers of.

C P C (1908) S. 115—Application to have execution of decree set aside. **See** C P C (1908) S. 47. Case No (511). **[redacted] O C 377.**

C P C (1908) S. 115—Application by prior purchaser to set aside a subsequent sale of same property—Sale set aside by Munsiff appealability of Munsiff's order. **See** C P C (1908) S. 47. Case No (523) **1 C L J 255.**

C P C (1908) S. 115—See C P C (1908) S. 67. Case No (1042). **95 P R 1888.**

C P C (1908) S. 115—See C P C (1908) S. 109. Case No (1258). **8 C W N 296.**

C P C (1908) S. 115—See C P C (1908) S. 96. Case No (1173) **14 M L J 321.**

C P C (1908) S. 115—Rateable distribution—Refusal where debtor has other property. **See** C P C (1908) S. 48. Case No (10600).

32 Mad 334.

C P C (1908) S. 115—Irregularities in proceedings. **See** C P C (1908) S.99. Case No (1201) **11 Ind Cas 274.**

C P C (1908) S. 115—Notice under S. 424 C P C & S. 580 of Land Acquisition Act—Notice after amendment of plaint. See C P C (1908) S. 80. Case No (1090). **30 Cal 36.**

C P C (1908) S. 115—Enhancement suit—Equitable rate—Prevailing rate. **See** C P C (1908) S. 92. Case No (1160). **29 Cal 252.**

C P C (1908) S. 115—See C P C (1908) S. 24. Case No (97) **A [redacted] N (1882) 62.**

C P C (1908) S. 115—The time runs from appellate decree S. 115. **See** C P C (1908) S. 48. Case No (826) **10 M L T 281.**

C P C (1908) S. 115—Appeal question relating to execution—Order refusing to grant a certificate — No appeal—No revision. See C P C (1908) S 47. Case No (539). **7 C L J 436.**

C P C (1908) S. 115—See C P C (1908) S. 2 cl 3. Case No (16) **12 Bom L [redacted] 762.**

C P C (1908) S. 115—See C P C (1908) S. 2 cl. 2. Case No (26) **27 All 380.**

C P C (1908) S. 115 See C P C S. 2 cl 2. Case No (27) **216 P L R 1911.**

C P C (1908) S. 115—Decree—Order to punish for contempt. **See** C P C (1908) S. 47. Case No (200) **2 A L J 16 and 18.**

C P C (1908) S. 115—Application to set aside—Dismissal for non — appearance—Maintainable or not. **See** C P C O 9 r 9. Case No 1800. **12 M L J 478.**

C P C (1908) S. 115—Order refusing restoration of property sold—Proceeds rateable distribution, held in—Excess of amount—Petition property sold. **See** C P C (1908) S.144 (1). Case No (1385). **27 Mad 504.**

C P C (1908) S. 115—See C P C (1908) S. 152 Case No (1419) **9 C W N 605.**

C P C (1908) S. 115—See C P C (1908) S. 153 Case No (1431). **5 C W N 192.**

C P C (1908) S. 115—When summons duly served. **See** C P C O 9 r 6 Case No 1724. **36 Cal 189.**

C P C (1908) S. 115—Effect of setting aside an exparte decree. **See** C P C O 9 r 13 Case No 1911 **U [redacted] R 1906 42.**

C P C (1908) S. 115—Order after decree for payment by instalments. **See** C P O O 20 r 11 Case No 2164 **11 C W N 857.**

C P C (1908) S. 115—Order under this section are subject to review. **See** C P C O 9 r 13 Case No 1966. **125 P R 1892.**

—S 115—Review-jurisdiction.
See C P C O 41 r 11 Case No 3047

30 Bom 625

—S 115—Revemoval of next friend
See C P C (1908) O 32 r 9 Case No (2863) **14 M L J 159**

—S 115—Detentton inshiction of subject matter of suit.
See C P C O 39 r 7 Case No 2929

2 S L R 22

—**S 115**—Decree holders buying without permission.

See C P C (1908) O 21 r 73 Case No 2598 **13 M L J 231**

—S 115—Resistance or obstruction by bonafide claimant

See C P C O 21 rr 97 99. Cases Nos 3712 & 3720 **13 C W N 724**

—S 115—Attachment—Investigation of claim—order—Appeal.

See C P C (1908) O 41 r 58. Case No (2552) **6 Bom L R 462.**

—S 115—Grounds for setting aside award

See C P C (1908) Sch II r 15. Case No 3221 **7 C W N 545**

—S 115—Mortgagee not entitled to intervene

See C P C (1908) O 21 r 58. Case No (2550) **1905 A W N 157**

—S 115—Dismissal of appeal on merits

See C P C O 41 r 17. Case No 3083 **A W N 1884, 167.**

—S 115— Mortgagee is not a person entitled to have aside.

See C P C (1908) O 21 r 89. Case No (2628) **30 Cal 425**

—S 111—Filing and enforcement of awards

See C P C (1908) Sch II r 21. Case No (3245) **10 C W N 609**

—S 115—Judgment according to award

See C P C (1908) sch II r 16 Case No 3229 **4 Bom L R 161**

1 MEANING OF THE WORD 'COURT'.

1281—C P C S. 115 (1908)=S. 622.

A District Registrar is not a Court within the meaning of S. 622, C. P.C. The word "Court" in the section means a place where justice is judicially administered. **Manavala Goundan v Kumarappa Reddi.** **17 M L J 318; 30 Mad 326.**

2 HIGH COURT WILL NOT EXERCISE REVISIONAL POWERS WHEN ANOTHER REMEDY IS OPEN.

1282—C P C—S.115 (1908)=S.622 [1882].

The ordinary rule is that where an aggrieved party has other remedy available, *e g.*, by regular suit, the High Court is unwilling to interfere in revision, but even if there be such remedy the High Court may interfere in exceptional cases. **Umatul Mehdi v Kulsoom** **12 C W N 16.**

3 WHERE COURT HAS JURISDICTION—HIGH COURT CANNOT INTERFERE.

1283-C P C-Ss.115;144(1)=(1882) Ss. 583,622] Restitution-Appeal-Order refusing restoration of ty sold—Property sold and proceeds rateably distributed.

(3) Where court has jurisdiction High Court cannot interfere —*Concld.*

The District Judge ordered rateable distribution of the proceeds of an execution sale between petitioners and counter-petitioners and distribution took place. The High Court found on appeal that the counter-petitioners were entitled to a less amount than they received. The counter-petitioners themselves were purchasers of certain items and the sale proceeds of those items were in excess of the sum found due to them. Petitioners applied for cancellation of the sale of these items purchased by counter-petitioners in restitution. The District Judge held that the sale was valid and that petitioners were entitled only to the excess amount. *Held*, the order of the Disrict Judge was not a decree, nor was there an appeal in any sense from his order. Nor could the High Court interfere in revision under s. 622 with the district Judge's order though illegal, there being no want of jurisdiction or material irregularity in its exercise. (25 Bom 337 ref to, 11 I A 237 and 11 Mad 220, 16 I A 104 ref to). *Semble*:-That the sale being for a sum in excess of the sum due is illegal. There can be no doubt that the sale was illegal in so far as it was unnecessary. The Court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from it (10 All 166 referred to.)

Parasurama Aiyar v Seshaier. 27 Mad 504.

4 GROSS OR PALPABLE ERROR OF LAW AMOUNT & ERROR OF JURISDICTION.

(1) Order deciding that petitioner was not representative.

1284—C P C—Ss. 115,47=[1882 Ss. 622, 244] Error of law.

S. 622 applies only to cases of error of jurisdiction and not to error of law; and consequently there can be no revision under S. 622 of an order deciding that a person was not the representative of a party under s. 244, C P C. **Ganga Charan Bhutta Charjee v Shoshi Bhushan Roy.** **32 Cal 572.**

(2) Decree unsupported by evidence.

1285—C P C—S. 115=(1882 S. 62

[4] Gross or palpable error of law—Amount & error of jurisdiction—*Concld.*

A decree which is unsupported by any evidence is made without jurisdiction and is liable to be set aside under S 622, C P C.7 Ad E(N S) 1031 Mad; 9 All 398 Fol. **Bessessur Das v Johann Simdt.** **10 C W N 14.**

1286—C P C—S.115—Error of law or of fact—No revision. **10 M L T 164.**

(3) Sanction—Miscellaneous proceedings.

1287-C P C-S. 115 (1908)=S. 622 (1882)-Criminal Pro Code Act V of 1898 Ss.195, 439—Civil Pro Code Act XIV of 1882 S. 622—Revision—Charge—Legal Practitioners'Act XVIII of 1879, S.14.—A Pleader purporting to act on behalf of a lady filed a compromise.

The lady complained to the Subordinate Judge that she had not authorized the pleader to compromise but the application was shelved. The lady then complained to the District Judge who directed an enquiry by the Subordinate Judge. The Subordinate Judge then held an enquiry and examined certain witnesses on behalf of the lady, disbelieved the applicant who was a witness, and on the application of the pleader, sanctioned his prosecution. This order was confirmed by the District Judge. *Held* that the High Court could not revise this order under S. 439, Criminal Procedure Code (28 All 554 F B Ref:). *Held* further that no revision lay on the Civil side, as the Courts below had not acted without Jurisdiction. *Held* further that the shelving of the first complaint was not a refusal to entertain the charge and this complaint followed by the communication from the District Judge amounted to charging of the pleader in the court of the Subordinate Judge within the meaning of S. 14, Legal Practitioner's Act. **Mazhar Hassan. v Said Hasan.** **5 A L J 749=1908 A W N 273=31 All 38=1 Ind Cas 509.**

(5) ACTING ILLEGALLY OR WITH MATERIAL IRREGULARITY IN THE EXERCISE OF JURISDICTION.

(1) What amounts.

1288.—C P C S 115-What amounts to material irregularities—When High Court may interfere under. See **9 Ind Cas 806.**

(2) Meaning of.

1289.—C P C S 115—'Irregularity' meaning of. See **13 Bom L R 879.**

[5] Acting illegally or with material irregularity in the exercise of jurisdiction--*Contd.*

(3) Garnishee proceedings—Exparte decree.

1290.—*C P C S 115*—Garnishee proceedings—Exparte order—Material irregularity-Revision See. **[illegible] Ind Cas 856.**

(4) Issue tried by the lower court is not an issue upon which the dispute could be adjudicated.

1291.—C P C S 115=(1882 S 622)-**Material** irregularity.

Where the only issue tried by the lower court is not an issue upon which the dispute between the parties could be properly adjudicated *Held*, that the High Court can interfere in revision. **Rudrappa v Narasing Rao. 7 Bom L R 12=29 Bom 213.**

(5) Bengal Tenancy Act S 153.

1292.—C P C S 115=(1882 S 622)—Bengal Tenancy Act S 153:—

Where a District Judge acted in contravention of the powers vested in him by the proviso to S 153 of the Bengal Tenancy Act by interfering with the judgment of the Munsif on a question of law, the District Judge acted without jurisdiction and the High Court can revise his order. **Horananda Banerjee v Annanta Dasi. 9 C W N 492.**

(6) A co-sharer landlord sues for his share of rent—Other co-sharers parties to the suit—Right of appeal.

1293.—C P C S 115 (1908)=*S* 622—Revisional powers of the High Court :—

The suit of a co-sharer landlord for his share of the rent falls within the provisions of S 153, Bengal Tenancy Act. Where the plaintiff, a co-sharer land-lord, brought a suit for his share of rent amounting to less than Rs 50 and he made his co-sharers *pro forma* defendants to the suits : *Held*—That an appeal to the High Court from the decision of the lower appellate Court is barred under S 153 of the Bengal Tenancy Act. **Sital Chandra Bhattacharjee v Sheikh Afiluddin.** **13 C W N 793.**

1294.—C P C S 115 (1908)—Co-sharer landlord—Suit for share of rent without making other

(5) Acting illegally or with material irregularity in the exercise of jurisdiction-*Concld.*

co-sharers parties—Appeal—Second appeal—Civil Procedure Code S 623.

A suit by a co-sharer landlord for his share of the rent only without making the other co-sharers parties is a suit instituted by a landlord for the recovery of rent within the meaning of S 153, Bengal Tenancy Act. When the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsiff who was specially empowered under Cl. (b) of S 153. *Held* :—That no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsif. But the decision of the Subordinate Judge, being without jurisdiction, was set aside under S 623, Civil Procedure Code. **Bhagbati Bewa v Nunda Kumar Chuckerbutty. 12 C W N 835.**

(7) District Judge illegally revoking sanction under S 195—Ordering prosecution under s. 476.

1295,—C P C S 115 [e].

It is at least clear that S 115, C P C, cannot be limited to the [illegible] of a subordinate Court acting altogether without jurisdiction, and the High Court interfered where a District Judge wrongly considered himself bound to revoke a sanction under S 195 Cr. P C and erroneously ordered a prosecution under Sec 476, Cr P C. The High Court restored the original sanction under S 295, Cr P C. **Ram Prosad Malla v Raghuban Malla. *(1909)* 13 C W N 1068=37 Cal 13**

6. INTERLOCUTARY ORDERS NOT SUBJECT TO REVISION.

1295A—Power to revise interlocutory orders. **See 2 M W N 369, 15 C W N 682, 1 M L T 278; 10 M L T 451.**

(7) ORDER GRANTING OR REFUSING TO GRANT A REVIEW WHETHER OPEN TO REVISION.

1296-1299.—C P C S 115; o 47 rr 7, (1882 —**Section 622, 629).**

(7) Order granting or rejecting to grant a reveiw, whether open to revision—*Concld.*

An order rejecting an application for review of judgment is final and a higher court cannot interfere with that order either on appeal or in revision. **Ram Lal v Ratanlal. 1 A L J 298=1904 A W N 130 =26 All 572.**

1300.—C P C S 115; S 114. O 47. r 1=(1882 Ss 622, 623).

An order rejecting an application for review of judgment by a Judge of the Small Cause Court can be revised by the High Court, where there has been no decision of it on the merits. (20 All 572 dist) **T G Willis v Jawad Hussain. 4 A L J 439=[1907]A. W. N.132= 29 All 468.**

Notes:—Ref : 6 A L J 884=31 All 610.

(8) POWER TO INTERFERE WITH DECREES OR ORDERS PASSED UPON AN AWARD.

(1) Appeal from award-Objections--Dismissal of objections-Decree in accordance with the award-Incompetency of appeal from such a decree.

1301.—C P C S 115 (1908)=S 622-Sch II r 16=(1882—Ss 522, 506)-Alleged misconduct of the arbitrator.

No appeal lies against a decree passed in terms of the award made on a reference to an arbitration under *S 506*, C P C., on the ground of misconduct on the part of the arbitrator, except in so far as the decree is in excess of, or not in accordance with, the award. Objections such as those filed by the appellants are more or less frivolous and are not misconduct within the meaning of that expression in the Chapter on "Arbitration" in the C P *C.* **Hansraj v Sundar Lal and Dwarka Das. 7 C L J 620= 12 C W N 585=18 M L J 266= 10 Bom L R 581=35 Cal 648= 35 I A 88 P C=138 P L R 1908= [illegible] P W R 1908=14 Bur L R 146= 4 M L T 25=80 P R 1908.**

(2) Appeal—Revision.

1302.—C P C S 115 (1908)=S 622. -**Agreement to be bound by Court's decision after local inspection-Award. 38 Cal 421.**

9 HIGH COURT'S REVISIONAL POWERS UNDER PRESIDENCY S C COURT ACT.

(1) Revision—Petition to High Court from a decision of a Presidency Small Cause Court Judge.

1303—C P C S. 115.

Revision-petition to High Court direct from a decision of a Presidency Small Cause Court Judge whether lies. **10 Ind Cas 551.**

(2) Failure to comply with Rule 98 of the Presidency Small Cause Court—Interference in revision.

1304—C P C S. 115.

Failure to comply with Rule 98 of the Presidency Small Cause Court Rules—Interference in revision. **10 M L T 163.**

(3) Small Cause Court Act—Civil Pro Code—Tiled huts—Suit for title—Suit for damages—Jurisdiction.

1305—C P C S 115. 1908=S 622, 1882.

Presidency Small Cause Court Act I of 1895. S. 38—Civil Procedure Code Act XIV of 1882 S. 622—N obtained a decree against D and attached the tiled huts alleging that they belonged to D. where upon A instituted a suit for damages for Trespass against N in the Small Cause Court. The Small Cause Court at first decided that it had no jurisdiction to entertain this suit, but later on an application of A that the suit was one for damages in which the question of title to the huts arose only incidenttaly, ordered a new trial. N moved the High Court against this order under, S. 622. C P C.

Held,—That A's suit was in reality a suit to determine the title to the titled huts which are immoveable property and the Small Cause Court had no jurisdiction to try the same. (11 Cal 260. distinguished 5 Bom 512 refd.) **Amrita Lall Kulay v Nibaran Khunder Nayek. 8 C W N 246=31 Cal 340.**

(4) Revisional jurisdiction over the Presidency Small Cause Court.

1306—C P C S. 115, 1908=S 622, 1882.

Vakil's right to audience in the original side of the Calcutta High Court—C P C S 622;—An application for revision of a decree of the Presidency Small Cause Court is properly made

to the High Court in the exercise of its original jurisdiction and as such should be presented by an advocate instructed by an attorney and not by a Vakil. **Sarat Chandra Sing v Brojo Lal Mukerjee 30 Cal 986.**

(5) Revision—Applicability to presidency Small Cause Courts.

1307—C P C s.115=(1882 S.622)-Presidency Small Cause Courts Act, S 69—Construction of document—Difference of opinion—Reference—S. 622 C P C. applicable to cases decided by the Presidency Small Cause Courts.

Where upon an application to the Presidency Small Cause Court for a new trial, the judges without formally ordering it, heard the whole case and differed on the question of construction of a document *i e* as to whether a condition formed an integral part of the contract affecting the merits of the case, *held* that they were bound to refer the question to the High Court and that their judgment was liable to be set aside under S. 622 C P C on that ground. **Rungiah Naidu v Rungiah 18 M L J 480= 31 Mad 490.**

(6) Revision—Presidency Small Cause Courts Act, S 9.

1308—C P C S 115. 1908=S 622-High Court—Charter Act:

The High Court, in the exercise of its superintending powers under its extraordinary jurisdiction will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. **Ismalji v Macleod. 8 Bom L R 969; 31 Bom 138.**

10 - ORDER AMENDING OR REFUSING TO AMEND A DECREE OR CLERICAL ERROR.

(1) Appeal—Second appeal—Review.

1309—C P C S 115, O 47 r 1, O 20 r 6=(1882 Ss.206, 622, 623)—Order amending decree—

An order under S. 206 C P C amending a decree is not a decree and no appeal lies against such an order, and the proper remedy is by an

(10) Order amending or refusing to amend a decree or clerical error—*Concld.*

application under S. 632 C P C; (7 All 875 ref. to and foll; 6 Cal 22 ref. to; 25 Cal 258 dist; [illegible] All. 377 and 11 All. 314 explained).

Nalinakshya (Raghu Nath) Ghoshal v Nabakshar Hossain Chowdhry.
5 C W N 192=28 Cal 177.

Notes—Ref: 31 Bom 447=9 Bom L R 547; 3 C L J 188 Dist 3 C L J 188.

11 MIS-CELLANEOUS CASES.

(1) Mis-construction of s. 87

Mis construction of S. 87—of Negotiable Instruments Act. **See 12 Ind Cas 138.**

(2) Attachment—Investigation of claim—Order—Appeal.

1311—C P C S 115, 1908=S 622, 1882

No appeal lies from an order passed under S. 278 of the Code of Civil Procedure upon the application by a person not a party to the suit, or by a party to a suit applying in a different character to raise the attachment.

Dayaram v Govardhandas 6 Bom L R 462 =28 Bom 458 at 460=also 6 C W N 614.

Notes.—Dist: 36 Cal 130. Ref. 11 Bom L R 764.

(3) Reversioner's application for reference—Order by judge in reference directing refund—Appeal—Revision.

1312-C P C S 115, 1908=622, 1882-Compensation money paid to Hindu widow—Civil Procedure Code, S. 622—Where a Land Acquisition Collector having awarded a certain sum as compensation for land acquired paid it to, among others a Hindu widow, and almost six months after the award her daughter asked for a reference to the Civil Court, and a reference having been made, the Judge ordered the lady to repay the amount withdrawn by her and the same to be dealt with according to the provisions of S. 32 of the Land Acquisition Act:—*Held*:-That until money was deposited in Court by the Collector, the Court could not proceed to deal with it under S. 32; that the Judge had no power to direct a refund of money already paid by the Collector; that the order was not one under S 32 Land Acquisition Act, [illegible] the Judge was not in a position to make such an order and so no appeal lay from it and the High Court could properly interfere under S. 622 Civil Procedure Code.

(11) Miscellaneous cases—*Concld.*

Gobindarani Dassi v Brinda Rani Dassi, 12 C W N 1039=35 Cal 1104.

(4) Right to move High Court to quash proceedings when called upon to show cause.

1313—C P C S. 115 (1908)=S. 622 (1883)—Refusal of brief for political reasons — Right to refuse—Reasons for refusal, if must be stated:—

A pleader is not bound to accept a brief offered to him, nor to state his reasons for refusing to accept it. A pleader having refused a brief offered to him was subjected to stringent examination to disclose his reasons, and on its appearing that his reasons were political proceedings were started against him under the Legal Practitioners Act, and he was called upon to show cause why he should not be reported to the High Court for unprofessional conduct. Without waiting to show cause, the pleader at once moved the High Court to quash the proceedings. *Held*.—That he was entitled to do so and that there was no rule of procedure to justify the examination to which he was subjected.-**Nalini Chandra Das Gupta, 12 C W N 381=35 Cal 317.**

(5) Omission to substitute defendants [illegible] representatives.

1314—Death of plaintiff — Some of the defendants legal representatives—Omission to substitute defendants as representatives.—
11 M L T 409.

(6) Revisionary jurisdiction over Talukdari Settlement Officer.

1315 1316—C P C S. 115 — Revisionary jurisdiction over Talukdari Settlement Officer.—
13 Bom L R 118.

(7) Interference—Revision of decree after appeal—Revision.

1316.1—C P C S. 115 [1882 s. 622] —

An order granting their view of a decree from which an appeal is pending [although such appeal is preferred after the review] is *ultra vires* and can be set aside by the High Court in appeal from the order granting the review or in revision under s. 622 C. P. C. **Ramanadhan Chetti v. Narayanan Chetti. 14 M L J 321= 27 Mad 602.**

C P C (1908) S.116=1882, S. 631.

See Letters Patent High Court.

—S 116—

See C P C (1908) 104 Cl 2. Case No (1226) **10 P L R 484**

C P C S. 117=1882, S. 632.

Notes:—This section corresponds with section 633 of the C P Code of 1882. The changes introduced in this section are the substitution of the word *save* for the word " except " and the words *this Part or in Part X or in rules*, for the words " this chapter and in section 652 " and the insertion of the word *shall* before the word " apply ". Section 652 of the old Code related to the power of the High Courts to make subsidiary rules of procedure.

C P C S. 117 (1908)=1882 s. 632.

See Letters Patent, High Court, N. W. P., cl. 10.

1317--C P C S. 117; O. 46 r. 7 [1882 C P C Ss. 652; 646B] — Revision Small Cause suit tried on regular side.—

The provisions of S. 646B, followed in a revision case.- **Parameshwaran Nambudiri v. Vishnu Embrandri. 27 Mad 478.**

Notes: Ref: 1 M L T 414. 17 M L J 487; 11 Bom L R 1330; 30 Mad 41.

C P C S. 118=1882, S. 634.

Notes:—This section corresponds with section 634 of the C P Code, 1882. No material change has been introduced in this section. The words *where any such* have been substituted for the word "whenever", the word *passed* has been substituted for the word " made " and the word *executed* has been substituted for the word " enforced".

C P C (1908) S. 119=1882, S. 635.

See Letters Patent High Court—High Court, jurisdiction of—

C P C (1908) S. 120=1882, S 638.

Notes:—Sub-section (1) of this section corresponds with the first part of s. 638 of the C. P. Code of 1882. The latter portion of the first part of s 638 of the old Code, has been omitted and reproduced in Order XLIX, rule 3 with some modifications.

Sub-section (2) of this section exactly corresponds with the last part of sec. 638 of the old Code.

C P C.(1908)S.120=(1882, S.636)-*Concld*

The other provisions relating to the chartered High Courts are to be found in Order XLIX.

C P C (1908) S. 120, cl. 2—See C P C (1908) S. 4. Case No. (65). **3 L B R 241.**

C P C (1908) S. 122=1882 S. 652.

C P C Ss.122, 129, 130 & 131=1882 S.652.

See Small Cause Court, Presidency Towns—Practice and Procedure—Leave to sue.

C P C (1908) S. 122—Judgment of single judge—Appeal under Letter Patent — Security for costs.—**See** C P C (1908) S. 141, Case No. [1344]. **13 M L J 362.**

—**S 122**—Appellate Court may require appellant to furish security for costs

See C P C O 41 r 10. Case No 3033

27 Mad 121

1318-1319-C P C(1908)S. 122, O.34, r 2-New rule made by the Chief Court in exercise of the power vested by s. 122 in place of r. 2 of O. 34—Effect of the new rule limiting mortgagee's substantive right to interest at mortgage rate for six months after decree—Rule *ultra vires.*—

The Chief Court, under the powers vested in it by s. 122 of the new Code, made [illegible] new rule in place of r. 2 of O. 34, whereby it substituted the Court-rate of interest in place of the mortgage-rate [illegible] payable by the mortgagor for the six months within which period he may redeem: *Held*, that the new rule, in so far as it limited the right of the mortgagee to recover interest at the mortgage-rate for the whole period allowed for redemption, was *ultra vires.* The rights that accrue to the parties up to the expiration of the period allowed for redemption are substantive rights that are out of the contract. The mortgagee's right to be paid interest at the mortgage-rate for the whole period allowed for redemption is on the same footing as the mortgagor's right to be allowed (after judgment) a definite period of time for redemption or as the mortgagee's right (in default of payment by the mortgagor) to foreclose or to sell the mortgage property.

Veerappa Chetty v. Muniandy Thaver, 12 Ind Cas 18,

C P C S. 129=1882 S. 652.

Notes:—This section corresponds with the third para. of section 652 of the C P Code. 1882 with some modifications.

C P C (1908) S. 129=(1882) S. 652.

See Cases under:—

Small Cause Court, Presidency—Towns-Practice and procedure—Leave to sue.

C P C (1908) S. 129—Judgment of single judge—Appeal under—Letter Patent — Security for costs.—**See** C P C (1908) S. 141. Case No. (1344). **13 M L J 362.**

1320—C P C S. 129—1882 S. 652 — Rules only consistent with the Code:—

Per Chandavarkar J.:—No rule of the High Court can add to or modify the conditions and limitations of the law laid down in the Limitation Act. The rules made or to be made under S. 652 C P C, must be " consistent " with the Code. There is no power given to frame a rule modifying any rule, or made as to computation of limitation prescribed expressly or by necessary implication in the Limitation Act.

Chunilal v. Dahyabhai. 9 Bom L R 1138= 32 Bom 14 F B=2 M L T 410.

S. 129—Appellate Court may require appellant to furnish security for costs.

See C P C O 41 r. 10. Case No. 3033.

27 Mad 121.

C P C S. 130=S. 652 (1882).

Notes:—This section corresponds with the second para of section 652 of the C. P. Code of 1882, with some modifications.

C P C (1908) S. 130=(1882) S. 652.

See Cases under.—

Small Cause Court Presidency Towns—Practice and procedure—Leave to sue.

C P C (1908) S. 130—Judgment of single Judge—Appeal under Letter Patent — Security for costs.—**See** C P C (1908) S. 141. Case No. (1344). **13 M L J 362.**

C P C (1908) S.130=(1882 S.652)-*Concld*

—S. 130—Appellate Court may require security for costs

See C P C O. 41 r. 10. Case No. 3033

27 Mad 121

C P C (1908) S. 131=(1882) S. 652.

See Cases under:—

Small Cause Court, Presidency Towns—Practice and procedure—Leave to sue.

C P C (1908) S. 131—Judgment of single judge—Appeal under—Letter Patent — Security for costs.—**See** C P C (1908) S. 141. Case No. (1344). **13 M L J 362.**

1321—C P C S. 131 — Resolution of High Court as to cost not published in Gazette, whether can be referred to in assessing costs.

A W N 1905. 83.

—S 131—Appellate Court may require appellant to furnish security for costs.

See C P C O 41 r 10. Case No 3033

27 Mad 121.

C P C (1908) S. 132=(1882) S. 640 (1859. S. 21).

—S. 640 (1859. S. 21).

See (1) Commission—Civil Cases.
(2) Parda-nashin Women.

C P C (1908) S. 132—Court's inherent power to set aside exparte decree.—**See** C P C O. 9 r. 13, Case No. [1953]. **30 Mad 54.**

1322—C P C S. 132—Commission—Examination of party to suit or proceeding-Application of section.—

The provisions of s. 132, Civil Pro. Code, are not restricted to the examination of witnesses. They apply also to parties to suits or proceedings before the Court. **Rahmat-un-nissa Begam v. Ahmed Husain Saib. 11 Ind Cas 668.**

1323—C P C S. 132 and O. XVI r. 21= 1882 S. 640, 159, 178—Summonses, powers of Court to refuse to issue—Remand.

An application for issue of summons to a witness must, as a rule, be granted and the question whether the application is in time is only to be

C P C (1908) S.132=(1882 S.640)-Concld

decided when afterwards owing to the failure of the witness to attend the Court an adjournment is prayed for by the party summoning such witness. Where a Court fixed a limit of time for the cross-examination of a particular witness and the examination concluded held that this was a good ground for remand. **Amir Ali Khan v. Kulsum Begam. 8 Ind Cas 418.**

—S. 132—Application of rules to persons of unsound mind

See C P C O 32 r. 15. Case No 2866
19 P R 1899.

C P C S. 133=1882 S. 641.

Notes:—This section corresponds with section 641 of the C. P. Code of 1882, with this modification that the words, " *and may, by like notification, withdraw such privilege* ", which occurred in para. 1 of the old Code. have been omitted.

C P C (1908) S. 135=S. 642 (1882).

Notes:—This section corresponds with section 642 of the C P Code of 1883. The first part of this section has been reproduced exactly from the old Code.

Some changes have been introduced in subsection. [2]: The words " *and except as provided by sec. 337A, sub-section 5. and sections 256 and 643* ", have been omitted; and the words " *other than process issued by such tribunal for contempt of Court* " have been inserted after the words "civil process".

Sub-section [3] is new. It is an exception to the general rule laid down in sub-section [2]. It provides that the judgment-debtor will not be entitled to exemption from arrest, when an order for immediate execution is made under Order XXI, rule 11 [1]; or when he appears before the Court in obedience to a notice calling upon him to appear and show cause against his arrest and detention, under Order XXI, rule 37 [1]

—S. 135. (1). (2)=1882 s. 642.

See (1) Arrest—Civil Arrest. Case No. (8).
5 Cal 106.
(2) Attachment—Attachment of Person.

1324—C P C S. 135=1882 S. 642—Returning from Court—Privilege of exemption from arrest—How far applicable—Arrest in execution of a decree—Appeal

C P C (1908) S.135=(1882,S.642)-Contd

The respondent obtained an *exparte* decree against the appellants at Benares. The appellants made an application to have the decree set aside. They being residents of Bombay, came from that place to Benares to look after their Case. They put up at a Dak bungalow, and attended the Court on the 27th of March 1909. Their application to set aside the decree was dismissed. They came back to the Dak bungalow and thence proceeded to the Railway Station. They took tickets for Allahabed and were seated in the train when they were arrested in execution of the decree, *Held*, under the circumstances, they could not be said to be returning from a tribunal within the meaning of S. 135 C P C 1908, and consequently they were not entitled to exemption from arrest.

Held, further, that an order directing the arrest and imprisonment of a judgment-debtor in execution of a decree is appealable (4 Mad 317 not approved; 14 B L R. 13 Ref.)

Ardeshar Framji v. Kalyan Das. 6 A L J 912=32 All 3=3 Ind Cas 46.

1325—C P C Ss. 135 47,=1882 Ss. 244,642—Appeal—Powers of Court.

An order under S. 642 dismissing a petition by a judgment-debtor claiming exemption from arrest is one relating to the execution of the decree and an appeal lies therefrom. A Judge who issues a warrant for the arrest of a judgment-debtor has surely power to issue orders for his release if he be found to have been illegally arrested at a time when he was exempt from arrest.—**Nayana Naickan v. Syed Gulam. (1908) 20 M L J 136.**

1326—C P C S. 135 (1) (2)=S 642.—K, a judgment-debtor, was arrested in execution of a decree against him. He had come to appear in a Court in obedience to a summons in a certain suit filed against him by another creditor and which was fixed for hearing on the next day. *Held*, that K was privileged from arrest under S 642 of the Civil Procedure Code. although by the summons he had the option of appearing by a pleader and he had already engaged a pleader and given him ~~an~~ necessary instructions, and it was not necessary for him to arrive in the even-

C P C (1908) S.135=(1882,S.642)-*Concl d*

ing and could have arrived by the morning train in time to attend the Court. **Parashram v. Kashiram 1885. P. J.. 211.**

C P C S 136 (1908).

See Cases under.

Attachment—Attachment before judgment.

1327—1328—C. P. C. S. 136 (1908). =(Civ. Pro. Code. 1882. s. 648)—Attachment before judgment—Property outside jurisdiction—Rulings of Special Court binding.

S. 648 merely prescribes the procedure to be adopted when property outside the jurisdiction of the Court is to be attached under any provision of the Code. It does not prescribe the circumstances under which attachment before judgment may be ordered of property situated outside the jurisdiction of the Court. (8 Mad 20, L B R 1893—1900, 56, Ref.) Rulings of the Special Court are binding on the Courts of Lower Burma, unless or until they are overruled by the Chief Court. **N. Pannu Theven v. Sathappa Chetty 1 L B R 310.**

Notes—Fol: 14 Bur L R 138=U B R, 1907, Civ. Pro. Code, 13, 3 L B R 255.

1329—C P C S. 136 O. 38 r 5;=(1882 Ss. 483, 484)—Attachment before judgment—Property outside jurisdisction.

Under the provisions of Ss. 483 and 484 of the Civil Procedure Code, 1882, a Court has no power to attach before judgment property outside the limits of its jurisdiction. **Raja Gokuldas v. Jankibai. Jamna Das v. Raichand. 5 Bom L R 570.**

1330—C P C S. 136: O 38 rr 5 (1) (2) 6 (1)= S. 483.

Attachment before judgment. Properties outside jurisdiction. Case in which an order was made attaching before judgment property outside the jurisdiction. **Ram Pertab Jhowar v Madho Rai. 7 C W N 216.**

—**S 136**—Attachment where cause not shown or security not furnished.

See C P C O 38 r 6 Case No 2921.
7 C W N 216.

—**S 136**—Attachment before judgment—Defendant called upon to show cause or furnish Security.

See C P C O 38 r 5. case No 2917
U B R 1907, 13.

C P C (1908) S.137=(1882 S.645)-*Concld*

C P C (1908) S.137 cl. 3=S 645.

Notes—Clauses (1) and (2) of this section correspond with clauses (1) and (2) of s. 645 of the C P Code of 1882. The words, "*and in what character applications to and proceedings in such Court shall be written.*" have been added in the latter part of clause (2).

Clause (3) is new and it refers to all other writings in any Court, except the recording of evidence.

C P C S. 137 of 1908=1882-Ss. 49-54(1859, ss. 26-32). **See cases under plaint.**

C P C S. 138=S. 185 A of 1882.

Notes—This section corresponds with clauses (1) and (2) of s. 185A of the C P Code of 1882, with some change of language.

Clauses (3) and (4) of the old Code have been omitted,

The Government of Bengal has authorized all Munsifs and Sub-judges to record evidence in English, *vide* the Calcutta Gazette, dated 12th June 1907 Pt I, p. 1012.The Government of Eastern Bengal and Assam has also issued similar notification in the Gazette of the same province in the previous week.

C P C (1908)S. 138:—See C P C (1908) S. 46
Case No: (135) **10 Ind Cas 794.**

C P C S. 139=S. 197 (1882).

Notes—This section corresponds with s. 197 of the C P Code of 1882. The changes introduced in this section are the insertion of the words, *or any other person* in clause (2) and the substitution of the words *to the deponent* for the words of the declarant in the last paragraph.

"The Committee have inserted the word " or other person " after the word " officer " in sub clause (b), in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required."—*See the Report of Special committee.*

C P C (1908) S.139=(1882 S. 197)-Concl

Instructions to District Judges as to the exercise of their powers to appoint Commissioners to administer oaths on affidavits.—Calcutta High Court Rule No 9 of 16th March 1893.

District Judges in Bengal and Bombay have been empowered under cl (c) to appoint Commissioners so administer oaths on affidavits—Calcutta Gazette 13th July 1881. Bombay Gazette Part 1, 1877.

C P C (1908) S. 139=1882 S. 197—**See** Practice—Civil Cases—Affidavits.

C P C (1908) S. 139=1882 S. 197—Oath, Power to administer **27 Mad 223.**

C P C S. 141. S. 647 of 1882.

Notes—This section corresponds with the first paragraph of s. 647 of the C P Code of 1882, with some change in the language. The second paragraph and the explanation to s. 647 have been omitted.

The explanation ran thus:—*This section does not apply to applications for the execution of decrees, which are proceedings in suits.*

C P C S. 141=1882 S. 647

1 **Proceedings to which this section applies** **1331—1338**
2 **Proceedings to which this section does not apply** **1339—1344**
3 **Miscellaneous Cases** **1345**

1 Proceedings to which this section applies.

1 Dismissal for default-Right to restoration 1331
2 Dismissed for default-Successive applications for execution 1332-1333
3 Rehearing—Execution proceedings 1334
4 Suit dismissed for default—Application to set aside dismissal—Dismissal of application—Application for restoration of such application 1335
5 Rule of procedure or substantive law-Inherent power of Court, saving of—Applicability of 1336
6 Order for temporary custody of minor's property—Applicability of the Code to proceedings under Act VIII of 1890 1337
7 Stay of execution pending an appeal —Power of appellate court to grant 1338

2 Proceedings to which this section does not apply.

1 Scope and applicability of 1339
2 Does not confer any right of appeal expressly given elsewhere by the Code 1340
3 Party to proceeding which is not a suit—No Right of appeal 1341
4 Second appeal—Cougnizable by Court of Small Causes 1342
5 Appeal from an order refusing to set aside the order dismissing an application for setting aside the sale in default 1343
6 Judgment of single Judge—Appeal under Letters Patent—Security for Costs 1344

3 Miscellaneous Cases.

1 Application for appointment of guardian 1345

—C P C S. 141=1882 s. 647 (Act XXIII of 1861, s. 38)

See (1) Execution of Decree—Application for execution and Power of Court.
(2) Execution of Decree—Stay of Execution.
(3) Execution of Decree—Transfer of Decree for Execution.
(4) Transferee of Civil Case—General Cases.

C P C S. 141—Applicability and scope of—**See** C P C O 9 r 8. Case No 1740. **10 C W N 991.**

—S. 141-Restitution of possession which did not amount to decree. **See** C P C (1908) S. 144 cl (1). Case No (1354) **9 O C 101.**

—S. 141—See C P C O 6 r 17. Case No 1633. **17 Mad 67.**

—S. 141-Reference to High Court.**See** C P C (1908) S. 92. Case No (1159A) **25 Bom 327.**

—S. 141—See C P C (1908) S. 2.Case No (9) **28 Cal 81.**

—S. 141-See C P C (1908) S. 4. Case No (65) **3 L B R 241.**

—S. 141—Applicability and scope. See C P C O 9 r 9. Case No 1777. **97 P R 1907.**

—S. 141—Application to set aside—Dismissal for non-appearance——Maintainable or not. See C P C O 9 r 9. Case No 1798. **2 Ind Cas 156.**

—S. 141—Adjournment for plaintiff's default —Payment of Costs. **See** C P C O 9 r 6. Case No 1734. **18 Bom 59.**

—S. 141—Dismissal of former suit for default —Appeal from dismissal order. **See** C P C O 9 r 9. Case No 1816. **3 M L T 199.**

—S. 141—Dismissal of former suit for default—Appeal from dismissal order. **See** C P C O 9 r 9. Case No 1818. **10 O C 353.**

—S. 141=C P C [1882] S. 647. **See** Dekkan Agriculturists Relief Act. **1887 P J 39.**

—S. 141—See Execution of Decree. **13 C L J 532.**

1 PROCEEDINGS TO WHICH THIS SECTION APPLIES.

(1) Dismissal for default—Right to restoration.

1331—C P C S. 141. O.IX, rr 8,9—Execution proceedings—Dismissal for default—Right to restoration. **3 P W R 1912.**

(2) Dismissed for default—Successive applications for execution.

1332—C P C S.141,O 9 r 9-Execution of decree —Previous application dismissed for default—Successive applications for execution—Admissibility. See **13 C L J 532.**

1333—C P C S. 141 O 9 r 9;=(1882 ss, 647, 100)—Dismissal for default—Application for revision dismissed for default—Application for rehearing--Sufficient cause—Absence of counsel owing to unusual combination of circumstances.

An application for revision by [illegible] parda-nashin lady was dismissed in default of appearance of both the counsels engaged by her for the case on the date fixed for the hearing. An application for re-hearing of the case was made on the ground that the counsel were prevented from appearing by an unusual combination of circumstances. It was objected that the application did not lie, and that there was no sufficient cause for non-appearance of the party at the hearing of the case.

Held, overruling the contentions, that application lay by virtue of ss. 103 and 647 of the Civil Procedure Code and that there was sufficient cause for rehearing of the application for revision. **Jivani v Bhagel Singh.** **3 M L T 199.**

(3) Re-hearing—Execution proceedings.

1334—C P C S. 141 Order IX r 9 O XXI r 103=1882 Ss. 647, 103, 332, 335.

An application for re-hearing of execution proceedings is maintainable under Order IX r 9 and is not barred under Order XXI r 103. S. 141 of the new Code has deliberately changed the provisions of the old Code as in S. 647. **Safdar Ali v Kishun Lal.** **12 C L J 6= 7 Ind Cas 241.**

(4) Suit dismissed for default—Application to set aside dismissed—Dismissal of application—Application for restoration of such application.

1335—C P C—S. 141—Maintainability.

Where [illegible] application to restore to file [illegible] suit dismissed for default is itself dismissed for default *held* that another application to restore the dismissed application to file can be entertained under S. 141, Civ Pro Code, 1908. (7 All 543 : 18 Bom 59 Ref.) **Manakji v Surajmal,** **7 N L R 32=10 Ind Cas 705.**

(5) Rule of procedure or substantive law—Inherent power of Court, saving of—Applicability of.

1336.—C P C Ss 141.151 and O. XXXIX r 1 Temporary injunction Provisions of O XXXIX r 1—Whether rule of procedure or substantive law of O XXXIX r 1 to arbitration proceedings —O XXXIX r. 1 in terms refers to suit only but S. 141 C P C provides that the procedure provided in the Code in regard to suits shall be followed, [illegible] far as it can be made applicable, in all proceedings of any Court of Justice.

O XXXIX r. 1 purports to do nothing more than declare what must be proved, before the

(1) Proceedings to which this section applies—*Contd.*

Court can grant an injunction of a particular kind. It defines the procedure to be followed by a party deserving the help of the Court, and does not confer a jurisdiction or create a right. It applies to proceedings under the Indian Arbitration Act, 1899.

Though it may be contended that the Code of Civil Procedure regulates, or even limits, the Court's discretion in granting injunctions the power to grant them is probably inherent in the Court and is certainly recognized and declared independently of the Code (See S. 52 Specific Relief Act, 1877). S. 151 Civil Pro Code, 1908, expressly states that nothing therein shall be deemed to limit or otherwise affect the power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. **E D Sasson and Co v. Mangal Chand.**

3 S L R 128. = 4 Ind Cas 609.

(6) Order for temporary custody of minor's property—Application of the Code to proceedings under Act VIII of 1890.

1337.—C P C S. 141 O. 40. r.1—Order for the temporary custody of minor's property-Appointment of receiver of minor's property—Applicability of the Code to proceedings under Act VIII of 1890.

13 Bom L R. 487.

(7) Stay of execution pending an appeal-Power of appellate court to grant.

1338.—C P C S. 141 r. 5,(1882)S. 647=545—Stay of execution pending an appeal against an order in execution—Power of appellate Court to grant. **28 Cal 734 at 737.**

2 PROCEEDINGS TO WHICH THIS SECTION DOES NOT APPLY.

(1) Scope and applicability of.

1339.—C P C S. 141 (=s. 647 Civ Pro Code 1882)—Guardianship—Arbitration.-Per Karamat Husain, J.—

S. 647 of the Code of Civil Procedure deals with procedure and procedure alone and does not touch the substantive law of arbitration. The consent of parties in a proceeding for the appointment of a guardian does not give the Judge any power to refer the matter to arbitration. **Mahado Prasad v. Bindeshari Prasad.**

5 A L J 101 = A W N 1908. 51 = 3 M L T 203 = 30 All 137.

(2) Proceedings to which this section does not apply—*Contd.*

Notes.—Ref 7 A L J 761 = 6 Ind Cas 219.

(2) Does not confer any right of appeal expressly given elsewhere by the Code.

1340.—C P C S. 141 (=Civ Pro Code 1882, s. 647)—Right of appeal.

It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge, such right must be given by statute or some authority equivalent to statute. S. 647 Civ. Pro Code does not confer any rigt of appeal not expressly given elsewhere by the Code. (11 Mad 26, 11 Mad 319 Ref.) **Parasurama Ayyar v. Seshier.**

27 Mad 504.

(3) Party to a proceeding which is not a suit—No right of appeal.

1351.—C P C S. 141, O 46 r. 1—Reference under O 46 r 1 by Court—Absence of power—Application under s. 83 Transfer of Property Act—Reference by Court-Not allowed.

S. 141 Civ Pro Code 1908, will not give a party to a proceeding which is not a suit, a right of appeal (26 Mad 438, 27 Mad 504; 19 W R 122 and 10 Bom. 433 Ref). Nor would it authorise a Court to invoke the jurisdiction of another Court by way of reference to it under O 46 r. 1 Civ. Pro Code, any more than it authorises a party to do so by way of appeal. Such right must be expressly conferred by staute. (11 Mad 26 P C Ref.) A Court cannot therefore,make a reference under O 46 r 1 in an application under s. 83 Transfer of Property Act. **K. Damodara Menon v. Patinhara Melsasseri Ikkambamma's Son Kellappa Menon. 21 M L J 613 = 1911 2 M W N 13. = 10 Ind Cas 879.**

(4) Second appeal Congnizable by Court of Small Causes.

1342.—C P C S. 141 = (1882 S. 647)—Decree—Execution.

C P C (1908) S.141=(1882 S.647)-*Contd.*

(2) Proceedings to which this section does not apply—*Concld.*

No second appeal lies from an order passed, in execution of a decree in a suit of the nature cognizable in the Court of Small Causes.

Narayan v. Nagindas. 7 Bom L R 641.= 30 Bom 118.

(5) Appeal from an order refusing to set aside the order dismissing an application for setting aside the sale in default.

1343.—C P C Ss. 141, 104, O 43 r. 1, O 9 r 9 O 21 r. 90 (=ss. 647, 588, 103, 311 C P C 1882).

S. 647 is so worded as only to render provisions of procedure applicable and cannot be so read with s. 588 cl. 8 (10 Bom 433, 27 Cal 414, 31 Cal 807, 11 Mad 319 Ref.) as to confer, by implication an indirect right of appeal, in asmuch as appellate jurisdiction cannot be created except by express language in an enactment. No appeal therefore lies against an order rejecting an application, under s. 103 of the Civ Pro Code for reviving an application under s. 311 of the Code dismissed for default. **Musammat Sobaran Kuar v. Ude Sah. 10 O C 353.**

(6) Judgment of single Judge—Appeal under the Letters Patent-Security for costs.

1344.—C P C Ss. 141, 122, 129, 130, 131, O 41 r. 10, (Ss. 547, 649, 652.)—Judgment of single Judge-Appeal under the Letters Patent-Security for costs.

S. 549 of the C P C applies only to appeals preferred to the High Court from the subordinate Courts subject to its appellate jurisdiction (25 Mad 555 referred to). S. 549, C P C is inapplicable to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges and S. 647 does not extend it to such appeals. No rule for taking security for costs having been in force in the old Sudder Court in such cases S. 9 of the Charter Act has no application. No rule has been passed by the High Court under S. 652 C P C. *Quære*—Whether it would be competent to the High Court to pass such a rule under S. 652 C P C. **Sesha Aiyar v. Nagarathna Lala.**

13 M L J 362.

C P C (1908) S.141=(1882 S.647)-*Concld*

MISCELLANEOUS.

(1) Application for appointment of guardian.

1345.—C P C S. 141 (1908) Chapter 11—Guardian and minor—Application for appointment of guardian—Procedure—Civil Procedure Code S. 647.

Where the mother of an unmarried female minor applied for certificate of guardianship under Act No VIII of 1890 it was *held* that it was a valid objection the parties being Mahomedans that the mother had married again. *Held*, also that in hearing an application for a certificate of guardianship, the Court ought to record the statements of the witnesses in the manner provided for by the Code of Civil Procedure. It is not sufficient merely to make on the back of the application notes of the statements of persons examined. **Ghafuran v. Chhanga.**

1906 A W N 64; 3 A L J 841.

—**S 141**—Applicability—Plaintiff's power to withdraw.

See C P C O 23 r 1. Case No 2783.

37 P R 1892.

—**S 141**—Appellatte court may require appellant to furnish security for costs.

See C P C O 41 r 10. Case No 3033.

27 Mad 121.

C P C S.142=S 94 of 1882.

Notes.—This section corresponds with s. 94 of the C P Code of 1882 with some modifications. The words "*and shall be served in the manner herein before provided for the service of summons*" have been omitted.

C P C S. 144=S. 583 of 1882.

Notes.—This section has been substituted for s. 583 of the C P C Code of 1882. The language of the old section has been completely changed and it has now been so framed that the Court of the first instance will be competent to make complete restitution to the party entitled to any benefit, by way of restitution or otherwise, under the decree passed in appeal. The present section is more comprehensive and clear than the old section, as will appear from a comparison.

Under the provisions of the old Code, the remedy of the person entitled to restitution in consequence of the reversal or modification in appeal of a decree, was of twofold, both by means of an application in execution or by a separate suit; but sub-section (2) has been added to prevent the enforcement of right of restitution by a separate suit. Under the present section the right of restitution must be enforced by an application under this section and should not be made the subject of a separate suit. The subject of the addition of sub-section (2) is to prevent unnecessary multiplicity of suits.

The principle of the doctrine of restitution is, that on the reversal of the judgment, the law raises an obligation in the party to the record, who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. That obligation, it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case.

"The terms of s. 583 of the Code do not justify the practice founded on it, and the Committee have therefore recast the section so as to bring it to closer conformity with that practice."—*See the Report of the Special Committee.*

" Sub-clause (2) has been added on the suggestion of the Calcutta High Court. We agree that restitution which may be obtained by application under this clause, should not be made the subject of a separate suit."—*See the Report of the Select Committee.*

Under the old Code there was much diversity of judicial opinion as to whether restitution could be enforced by a separate suit or only by an application under s. 583, C P Code of 1882, but the point has been set at rest by the addition of sub-section 2.

The cases under the old Code, which decided that restitution could be obtained by a separate suit have been superseded and they are no longer the law.

1 **Mode of enforcing the right of restitution 1346—1356**

2 **Suit for restitution may be treated as application 1357—1358**

3 **Appellate Court not specifying costs or interest of the original decree 1359—1361**

4 **Right to restoration includes claim to mesne profits 1362—1373**

5 **Party entitled to any benefit by way of restitution or otherwise 1374—1376**

6 **Right of restitution enforceable only against parties to the suit and not against third parties 1377-1381**

7 **Miscellaneous cases 1382—1385**

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1 Mode of enforcing the right of restitution.

1 Applications for restitution—Applicability 1346

2 A Court bound to make every order fairy and properly, as to restore the parties to the same position 1347

3 Execution of decree 1348

4 Method of enforcing security bond 1349

5 Jurisdiction—Refund, application for 1350

6 Inherent jurisdiction to direct 1351

7 Principle if applicable to restore a sale under an exparte decree set aside 1352

8 Wrong done-by Order of court—Jurisdiction of executing court to place the parties in statuts *quo ante* 1353

9 Restitution of possession which did not amount to decree 1354

10 Re-instatement of holders when notice is finally cancelled 1355

11 Decree—Possession—The Help of the Court—Subsequent dispossession-Confirmation of decree—Application for 1356

2 Suit for restitution may be treated as application.

1 Refund of money realized in execution of—Execution of decree stayed by injunction— Procedure — Execution proceedings 1357

2 Application for restitution—Suit tried as application 1358

3 Appellate Court not Specifying costs or interest of the original decree.

1 Costs—Execution 1359

2 Interest—Costs of appeal to Privy Council 1360

3 Claim by legal representative of deceased defendant for restitution of amount paid as costs 1361

4 Right to restoration includes claim to mesne profits.

1 Right to recover mesne profits by way of restitution is not a decree for money 1362

2 Application for possession and mesne profits 1363

3 Decree for restitution of property silent as to mesne profits 1364

4 Interest—Mesne profits 1365

5 Mesne profits—Jurisdiction to restore all such benefits 1366

6 Mesne profits—Execution Court—Jurisdiction—Auction sale, validity of. 1367

7 Award of mesne profits for period of dispossession 1368

8 Mesne profits after the decree has been reversed in appeal 1369

9 Mesne profits when in a redemption suit mortgagor takes possession of the whole property 1370

10 Mesne profits—Limitation—Date of accrual—Cause of action 1371

11 Recovery of mesne profits for period between decree of High Court in appeal and Decree in review 1372

12 Claim for mesne profits and interest by true representatives—Title of the judgment-debtor 1373

5 Party entitled to any benefit by way of restitution or otherwise.

1 Restitution 1374

2 Restitution due in virtue of the modification in appeal of the decree of a Rent Court—Procedure 1375

3 Restitution of property—Execution of decree 1376

6 Right of restitution enforceable only against parties to the suit and not against third parties.

1 Assignee of decree—Restitution to assignee in execution proceedings 1377

2 Costs realized by assignee—Suit by successful appellants to recover from the assignee the costs realized by him 1378

3 Assignee not party to appeal—Restitution in execution 1379

4 Right to apply not confined to parties to appeal—Rights accruing during litigation 1380

5 Restitution against a person not party 1381

7 Mis-cellaneous Cases.

1 Application for execution of decree 1382

2 Defendant entitled to be restored to possession — Decree being reversed 1383

3 Tenant not entitled to restitution as there is no decree in his favour 1384

4 Order refusing restoration of property sold——Proceeds rateably distributed——Amount paid in rateable distribution, held in—Excess of amount—Petition to restore property sold 1385

C P C (1908 S. 144 (1)=(1882) S. 583 (1859, S. 362)

See Cases under;—

(1) S. 244—Questions in Execution of Decree.

(2) Execution of Decree—Application for Execution and Powers of Court.

(3) Mesne Profits—Assessment in Execution, and Suits for.

(4) Pre-emption—Purchase-money.

(5) Restitution of Rights by Motion.

(6) Surety—Enforcement of Security.

C P C (1908) S. 144 (1)—See C P C (1908) S. 115. Case No. (1283) **22 Mad 504.**

—S. 144 (1)—Setting aside sale order under S. 244—Interpretation—**See** C P C (1908) S. 47. Case No. (116). **8 O C 254.**

C P C-S. **144 (1)**—Power of Court-Appeal. **See** C P C (1908) S. 47. Case No. (384). **8 M L J 276.**

—S 144 (1) —Suit barred—Restitution. **See** C P C (1908) S. 47. Case No. (388). **29 All 348**

—S 144 (1)—Interest on money taken out of Court in execution of decree—Separate suit. **See** C P C (1908) S. 47.Case No. (785).
32 P R (1896).

—S. 144 cl.(1)—No bar by S.244,not strictly applicable to. **See** C P C (1908) S.47. Case No 389
35 Cal 265.

—S. 144 (1)—Auction-purchaser. **See** C P C (1908) S. 47. Case No (387).
(1912) M W N 513.

—S. 144 cl. (1)—Application for refund of money. **See** C P C (1908) S. 47. Case No. (390).
30 All 476.

—S. 144 cl. (1)—Claim for mesne profits & interest by representatives in title of the judgment debtor—Decree-holder's claim for interest on the purchase money. **See** C P C (1908) S. 47 Case No. 618, **10 C L J 257.**

—S. 144 cl. (1)—Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit. **See** C P C (1908) S. 47. Case No (613). **28 All 655.**

—S. 144 cl. (1) –Restitution due in virtue of the modification in appeal of the decree of a rent Court—Procedure. **See** C P C [1908] S. 47 Case No [634]. **26 All 149.**

—S. 144—Effect of setting aside an exparte decree. **See** C P C O 9 r 13. Case No 1923.
14 C W N 182.

—S. 144 cl. (1)—Decree set aside—Decree exparte—Second decree satisfied—Suit for possession by judgment-debtor—Not barred **See** C P C (1908) S. 47. Case No (576).
6 A L J 283.

1 MODE OF ENFORCING THE RIGHT OF RESTITUTION.

(1) Applications for restitution—Applicability.

1346—C P C S. 144 (1)=(S. 583)—Suit for possession of land sold to decree-holder in auction sale—Decree satisfied by deposit.

(1) Mode of enforcing the right of restitution—*Contd.*

S. 583 of the Code of Civil Procedure only applies to a case where [illegible] party is entitled to a benefit by way of restitution or otherwise under [illegible] decree passed in appeal. **Girdhari Lal v Khushali Ram. (1909) 6 A L J 383= 31 All 364.**

(2) A Court bound to make every order fairly & properly [illegible] to restore the parties to the same position.

1347—C P C S. 144 (1)=S. 583 of 1882

A Court in making restitution under S. 583 of the Civil Procedure Code (Act XIV of 1882) is bound to do everything and make every order fairly and properly consequential on the reversal of the original judgment such as giving costs and interest on the refund, so as to restore the parties, so far [illegible] they [illegible] be restored, to the same position they were in at the time of the erroneous order. Persons from whom money has been taken away should have that money restored to them with interest. **Vithoba Timappa Shambhoy v Vasudev Rambhat. P J (1898) 335.**

(3) Execution of decree.

1348—C P C S. 144 (1)=(1882 S. 583).

The Court has inherent power to undo [illegible] wrong done in execution of a decree, and to order the restitution of everything that has been improperly taken in such execution. There is no distinction between things that should have been taken and things that should not have been taken, in execution of the decree. (21 Cal 989 Fol.) **Dinesh Prasad v Sankar Chaudhury. 2 C L J 537=9 C W N 381.**

(4) Method of enforcing security bond.

1349—C P C—S. 144 O. 41 r. 5 S. 145=(1882 Ss. 583, 545 and 253)—Bond given under s. 545.

The effect of S. 583, read with s. 253, is that the proper method of enforcing a security bond given under S. 545, is by execution. (12 Bom 411; 23 Bom 478: 25 Bom 409. 13 Mad 1. 17 All 99 Fol: 15 Cal 497; 25 Cal 312 Diss.) **Lalla Davee Narayana Lall v Mohan Panday. 4 L B R 197=14 Bur L R 170.**

(5) Jurisdiction—Refund. application for.

1350 –C P C—S. 144=(1882 Sec, 583).

(1) Mode of enforcing the right of restitution—*Contd.*

A mortgagee. in execution of a money decree, purchased 2 annas out of 8 annas of certain property mortgaged to him. He subsequently obtained a mortgage decree and in execution the subordinate Judge passed an order for the sale of the 8 annas. On appeal the District Judge directed that only 4 annas of the property should be sold. On second appeal the High Court held that execution should have been issued after deducting an amount proportionate to the value of the 2 annas share previously purchased by the mortgagee. In the meantime, the 4 annas share had been sold as directed by the District Judge. The judgment-debtors thereupon applied to the Subordinate Judge for a refund to them, of the proportionate value of the 2 annas share.

Held, that the application fell properly within Sec, 583. Civ. P.C.and should have been made, not before the subordinate Judge, but before the District Judge who had "passed the order against which the appeal was preferred." **Khem Narain v Musstt, Ganesho Kuar.** **5 C W N 287.**

(6) Inherent jurisdiction to direct.

1351—C P C—S. 144 (1)=(1882 S.583)-Restitution.

Where a wrong has been done by an order of a Court which has been set aside on appeal, the Court executing the decree is competent to put the parties in the postition which they occupied before the wrong was done.The appellant obtained a decree against L and proceeded to sale certain properties to which the respondent laid claim.The appellant had to bring a suit for declaration that the property was the property of L and obiained a decree from the Court of first instance and sold the property. On appeal, the decree was set aside and the suit was dismissed. *Held* that the respondent was entitled to recover back the property in the execution department and it was not necessary for the respondent to bring a fresh suit for possession.(6 C W N 710 ref.) **Shiam Sundar Lal v Kaisar Zamani Begam.** **4 A L J 19=1906 A W N 315=29 All 143.**

Notes.—Fol: 5 A L J 527 Ref: 30 All 476=1908 W N 206=5 A L J 327.

(1) Mode of enforcing the right of restitution—*Contd.*

(7) Principle if applicable to restore a sale under an exparte decree set aside.

1352—C P C—S. 144=S. 583 of 1882—Subsequent contested decree if revives whole decree -Civil Procedure Code (Act XIV of 1882) S. 108.

Where an *ex parte* decree and sale under it were set aside and after a re-hearing a decree was again passed against the judgment-debtors.

Held,—That the principle of S. 144, C. P. C, cannot be availed of to set aside the order setting aside the sale.

When a decree has once been set aside under S. 108, C, P. C, (Act XIV of 1882), it cannot by any subsequent proceeding be taken to be revived.If a decree is passed against judgment-debtors on re-hearing, it is a new decree and does not revive the former decree. **Raghunandan Sing v Jagdis Singh.** **14 C W N 182=3 Ind Cas 30.**

(8) Wrong done by order of Court—Jurisdiction of executing Court to place the parties in status quo ante.

1353—C P C—S. 144 [1]=[1882 s. 583] -Order to set aside-No express order in the decree.

The principle on which the courts have proceeded is that when there has been a wroug done by an order of a Court which has been set aside on appeal, the court executing the final decree, without express authority of law, is competent to put the parties into the position that they occupied before that order. **Radhey Singh v Magni Ram.** **6 C W N 710.**

Notes.—Ref: [1906] W N 315; 4 A L J 19; 29 All 143; 6 C L J 662.

(9) Restitution of possession which did not amount to decree.

1354—C P C—Ss. 144 [1]; 141; O. 21 r. 90 =[1882 ss. 583, 647; 311].

Held, that the s. 583 read with s. 647 of the Code provided for restitution of possession under orders passed in appeal which did not amount to decrees. **Raja Rampal Singh v Lal Ramesh Singh.** **9 O C 101.**

(1) Mode of enforcing the right of restitution—*Contd.*

(10) Re-instatement of holders when notice is finally cancelled.

1355—S. C P C 144 (1)=S. 583 of 1882.

The appellant on his objection to notice of ejectment being dismissed was ejected from his holding. He appealed to the Judicial Commissioner, who decreed his appeal, and he then appealed to the Rent Court to be put in possession of the land from which he had been ejected but without success. The Lower appellate Court held that the Rent Court was right in declining on the Judicial Commissioner's decree to direct possession to be given by way of execution. *Held*, that the Rent Act has to be read along with the Civil Procedure Code, and s. 583 fully empowers the Court, whose decision is reversed, to give relief by restitution or otherwise, and that as the mode of executing a decree upholding a notice of ejectment is by taking aid from the Deputy Commissioner, it follows that a similar course must be resorted to when the notice is finally cancelled. **Ram Lal v Dat Ram. Oudh A R No 56.**

(11) Decree—Possession—The help of the court—Subsequent dispossession—Confirmation of decree—Application for.

1356—C P C S.144(1)=(1882 s. 583)—Possession in execution with the help of the Court—Execution—Maintainability.

The respondent's father obtained a decree as plaintiff in the District Munsiff's Court and took possession of certain properties through Court. On appeal, the District Judge reversed the decree and the present appellant applied for restitution which was not granted as the High Court stayed the execution of the decree on plaintiff's furnishing security. The security was furnished and plaintiff continued in possession. During the pendency of the appeal in the High Court, the plaintiff died and the present repondents were brought on record. Then the present appellant who was the defendant in that suit took wrongful possession of properties. Eventually the High Court reversed the District Judge's decree and confirmed the Munsiff's decree. The plaintiff then applied for delivery of the properties a second time through Court and for recovery of costs of Appeal. It was contended that the decree having been once executed the Court has no longer any power to execute the decree again. The lower courts disallowed the defendant's objection.

Held, on appeal, that the order was right. **Theevana Pillai v Kulla Pillai alias Subroya Pillai. 7 M L T 107=5 Ind Cas 776.**

2 SUIT FOR RESTITUTION MAY BE TREATED AS APPLICATION.

(1) Refund of money realized in execution of—Execution of decree stayed by injunction—Procedure—Execution proceedings.

1357—C P C S. 144 [1]=[1882 S. 583]—Refund of money realized in execution of a decree afterwards reversed in appeal — Limitation— C. P. C. S. 244.—

On the 7th October, 1901, an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried and on the 17th September 1904 the Court of First Instance made a decree in favour of plaintiffs for Rs. 1771-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September, 1907, the rsepondents applied for a refund of the difference (Rs. 1804) between the sum realized by the plaintiffs and the sum finally decreed.

Held, that the plaintiffs were at liberty to proceed either by application or by suit, (10 M I A 203; 28 All 665) and that the application was not barred by limitation and (29 All 143 Ref 28 Cal 113 Dist:) **Bithal Das v. Jamna Prasad. A W N (1908) 206=5 A L J 527.**

(2) Application for restitution—Suit tried as application.

1358—C P C—S. 144 (1)=(1882 s. 583)— Suit barred.

Where a decree-holder obtains possession of the property without intervention of Court and the decree is reversed on appeal, no suit lies for

(2) Suit for restitution may be treated as application—Concld.

possession of the property so taken possession of after the decree of the lower Court. Ss. 244 and 583 bar such a suit, the language of these Sections being imperative. (23 All 79 and 25 All 441 ref.)

Where instead of an application for restitution, the plaintiff brought a suit for possession but prayed that his suit may be treated as an application for execution, *held*, that his prayer should be granted. **Sheodahal v Bhawani. 4 A L J 188=A W N (1907) 90=29 All 348.**

(3) APPELLATE COURT NOT SPECIFYING COSTS OR INTEREST OF THE ORIGINAL DECREE.

(1) Costs—Execution.

1359.—C P C Ss.144 (1)=(1882 Ss.583, 612)-Application for leave to appeal to Privy Council.

Where a Division Bench of the High Court makes an order dismissing an application for leave to appeal to His Majesty in Council with costs the order as to costs, is to be enforced by execution in the lower Court which passed the order originally. **Jogendra Chandra Sen v. Wazi-Dunnissa Khatun.** **11 C W N 856=34 Cal 860.**

(2)—Interest—Costs of appeal to Privy Council.

1360—C P C S. 144 (1)=(1882) S. 583—Payment into Court conditional.

A judgment-debtor who pays money into Court to save his property from sale in execution with a stipulation that the judgment-creditor is not to receive it unless he gave security, is not, if the latter refuses to accept the condition and the money remains in Court, entitled to recover interest on the deposit if the decree is reversed in appeal. It would be otherwise if the creditor took the money and had the use of it.

Interest on costs of an appeal to the Privy Council not provided for in the decree cannot be awarded. **Waghela Raisingji v. Shekh Masludin.** **1888 P J 271.**

(3) Claim by legal representative of deceased defendant for restitution of amount paid as costs.

1361.—C P C S. 144(1)=(1882 S.583)-Decree awarding costs as against two defendants—Payment of one defendant—Reversal of decree.

A decree awarded costs against two defendants. One defendant paid the costs. Both appealed. One died during the pendency of the appeal, and his legal representatives were not brought on the record. The survivor prosecuted the appeal and the decree was reversed. *Held* that the appeal had been prosecuted on behalf of the surviving defendant alone and the decree must be construed as limited to his interests, so the original decree stands as against the first defendant and his heir is not entitled to restitution of the costs levied from his father until he had successfully prosecuted the appeal of his father which was still pending. **Natesa Aiyar v. Annasami Aiyar. 25 Mad 426.**

Notes.—Ref 30 Cal 718.

4 RIGHT TO RESTORATION INCLUDES CLAIM TO MESNE PROFITS.

(1) Right to recover mesne profits by way of restitution is not a decree for money.

1362.—C P C O 21 r. 53 s.144(1)=[1882 ss. 273, 583]—Money decree.

A right to recover mesne profits by way of restitution is not a decree for money and so cannot be attached as such. S. 273 C P C applies only to cases where the right attached is one expressly settled by the decree. *Semble*:—If summary order under s. 583 C P C awarding mesne profits is passed prior to the attachment, it might be a decree under S. 273 C P C. **Vasudeva Rai Varman v. Narayana Patter. 24 Mad 342.**

(2) Application for possession and mesne profits.

1363.—C P C S. 144 [1]=1882 S. 583-Decree reversed on appeal after possession obtained thereunder-Disallowance of application-Separate suit for mesne profits.

S. N obtained a decree for foreclosure on a mortgage against R R. Against this decree R R appealed to the High Court but pending the appeal S. N obtained an order absolute for fore-

(4) Right to restoration includes claim to mesne profits—*Contd.*

closure and got possession of the mortgaged property. Subsequently the High Court set aside the order for foreclosure and modified the decree of first court. R paid up the amount found by the decree of the High Court to be due by him. He then applied to the court for restoration of possession of the mortgaged property under s.583 and for mesne profits for the time during which he had been out of possession. His application for mesne profits was rejected and he thereupon filed a separate suit for mesne profits. *Held* that such suit would not lie, the plaintiff not having appealed from the order refusing his application for mesne profits. **Sri Nath Sahai v. Ram Ratan Lal** **1902 A W N 95=24 All 361.**

(3) Decree for restitution of property silent as to mesne profits.

1364.—C P C S.144 [1]=[1882 s.583]-Mesne profits—Mesne profits, ascertainment of, in execution department—Orders of His Majesty in Council, power to give effect to—Inherent power of Court-Civ Pro Code s. 583.—

Held, that Courts in this country have inherent powers to give effect to orders of His Majesty in Council.

Held, further that where a decree orders restitution of property but is slient as to *mesne profits*, the Court, whether by virtue of s. 583 Civ Pro Code by reason of its inherent powers can order execution for *mesne profits* (34 Cal 860 29 All 143 Ref 7 M I A 238; 31 Cal 989 Ref; 8 I A 219; 5 C L R 189 Dist.)

Rajendra Bahadur Singh v Raghubans Kunwar. **11 O C 235.**

(4) Interest—Mesne profits.

1365.—C P C S. 144 [1]=S. 583 of 1882.

Held—that a person who is entitled under s. 583 of the Code of Civil Procedure to the restoration of a benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal, is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or if the thing to be restored is land, to mesne profits for the period during which he has been kept out of possession. (18 W N 100 approved.) **Hardat v Izzat-un-Nissa Begam.** **18 C W N 153, 21 All 1.**

(4) Right to restoration includes claim to mesne profits—*Contd.*

(5) Mesne profits—Jurisdiction to restore all such benefits.

1366—C P C S. 144 [1]=(1882 s. 583)—Restitution—to restore all such benefits as the party seeking restitution is deprived of.

It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree, it is about to reverse, has been executed or not. Hence where a mortgagee was deprived of possession of the property comprised in his mortgage in execution of a decree for redemption passed by the Subordinate Judge, but the High Court subsequently modified that decree by raising the amount payable by the mortgagor and the mortgagor failed to pay the increased amount. Whereupon the mortgagee made an application to the Subordinate Judge for restitution of possession and for mesne profits, *held* that the Subordinate Judge had jurisdiction not only to make restitution by restoring possession but also to award mesne profits although the decree of the High Court did not specifically provided for mesne profits. **Parbhu Dayal v Ali Ahmad,** **7 A L J I=4 Ind Cas 376=32 All 79.**

(6) Mesne profits-Execution Court—Jurisdiction—Auction sale, validity of.

1367—C P C S. 144 (1) (1882 S. 583)—Execution of appellate decree—Restitution—Mortgage—Redemption—Appellate Court.

R executed a usufructuary mortgage in favour of D in 1863. R's interest in the property was subsequently purchased by one Z and his sons. Z died in 1873 In 1877 his sons brought a suit for redemption against D. The suit was decreed by the first Court, on condition of the plaintiff's paying a certain amount of mortgage money. They paid the amount and got possession of the property. On appeal, the High Court decreed a larger amount to the mortgagee than what was decreed by the Court of first instance. The excess so decreed by the High Court was not paid to the mortgagee within the fixed time. The mortgagee thereupon applied in execution to get back the property, and also prayed for mesne profits for the period during which he had been out of possession owing to the decree of the first Court. The Court awarded the mesne profits in order to realise these, the equity of redemption was put to sale and was purchased by the mortgagee himself. Subsequently the representative of the mortgagor sold [illegible] portion of the property to P: in a suit brought by P to redeem the mortgage of 1863.

Held, that P had no right to redeem.

Held, further, that a decree of reversal by an appellate Court contains, by necessary implication, a direction to the Court below, to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance. In the absence of a specific direction in the decree of the appellate court the Court executing the decree is not deprived of its jurisdiction to award mesne profits by way of restitution. The executing Court has jurisdiction to decide whether mesne profits should or should not be awarded and if any sale takes place for the realization of the mesne profits [illegible] determined it is a valid sale (9 W R 402; B L R Sup Vol. 985; 23 Mad 306; 28 All 665; A W N (1906) 171; 3 A L J 665. Fol 22 Cal 434; 22 I A 68 Dist.)

Pandit Parbhu Dayal v Sheik Ali Ahmad
4 Ind Cas 376.

(7) Award of mesne profits for period of dispossession.

1368—C P C S 144 (1)=Section 583—Execution of decree of Appellate Court-Restoration of land to party dispossessed.

Held, that a party seeking restitution under Section 583 of the Civil Procedure Code is entitled to be fully restored to his former position and when he has been dispossessed of land, to be awarded mesne profits for the period of his dispossession. **Himan v. Hukman Singh**
28 P. R., 1896).

(8) Mesne profits after the decree has been reversed in appeal.

1369—C P C S. 144 (1)=(1882 s. 583)—Restitution of mesne profits after the decree jurisdiction has been reversed in appeal—Court fee—Circular No. 6 of 1893, dated the 25th November.

A sued B for possession of certain immoveable property. A obtained a decree, and in execution thereof got possession of the property. B appealed, and in appeal the decree of the first Court was set aside. [illegible] accordingly applied under S 583 of the Code of Civil Procedure for possession to be restored to him together with mesne profits for the time during which A was in possession under his decree, and was awarded restitution of possession and mesne profits as prayed. From this order A appealed. *Held*, that the Court fee payable on the memorandum of appeal was an ad valorem fee. **Gujdip Narain Singh v. Mahant Keshogir. 1901 A W N 180.**

(9) Mesne profits when in a redemption suit mortgagor takes possession of the whole property.

1370—C P C S. 144 (1)=(1882 [illegible] 583)—Redemption— Mesne profits when in a redemption suit mortgagor of [illegible] portion of mortgaged property takes possession of the whole property on payment of smaller [illegible] than that subsequently found due by Appellate Court.

Mesne profits allowed from the date of obtaining possession up to the date of payment of the whole amount found due in appeal (26 Bom 661) (24 All 861). Appeal No. 73 of 1905 ref. to. **Gaya Din v. Thakur Lal**
9 O C 254.

(10) Mesne profits—Limitation—Date of accrual—Cause of action.

1371—C P C S. 144 (1)=S. 583-Court-fees—Application for execution-Restitution—Civil Procedure Code (Act XIV of 1882). Sec. 583-Court Fees Act (VII of 1870), Sch II Art II—Limitation Act (XV of 1877), Sch II. Art 109.-

An application for mesne profits made not by the plaintiffs but by the defendants against whom the suit had been dismissed by way of restitution under section 583, Civil Procedure Code, is one under section 244 (c) of the Code. Such application would be chargeable with Court-fees under Art, II Sch II of the Act and not *ad valorem*.

C P C (1908) S.144=(1882,S.583)-*Contd*

(4) Right to restoration includes claim to mesne profits—*Contd.*

The Cause of action for mesne profits arises on the day the rightful owner is restored to possession. **Gangadhar Marwari v. Lachmun Singh 11 C L J 541=6 Ind Cas 125.**

(11) Recovery of mesne profits for period between decree of High Court in appeal and decree in review.

1372—C P C Ss. 144 (1); 47=(1882 Ss. 583, 244)—Review—Separate suit-Application in execution.

Where M. D., defendant in a partition suit, was deprived by the High Court of a house allotted to him by the first Court, and subsequently the High Court, acting under Ch. XLVII set aside its decree, and M D., having recovered possession of the house, applied under S. 583, C P C, for mesne profits. *Held*, that S. 583 had no application, the order entitling M. D to restitution having been passed under Ch. XLVII, not in appeal under Ch. XLI. *Held* further, that it was not necessary for M D to bring a separate suit, one of his remedies was by summary process i. e., by an application under S. 244, and the application might be deemed to be one under that section (1 All 203 ref to; 9 W R 403; 25 All 441; 27 All 485 approved). *Semble*: Also that the lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken (14 Cal 484; 22 Cal 989 ref to.) It was further urged that in any Case M D could not recover more than three years' mesne profits. *Held*, that the applicant having been guilty of gross laches in not applying for review for many years should get mesne profits only from the date of the High Court's decree in review.

Collector of Meerut v. Kalka Pershad. 1906 A W N 171.

(12) Claim for mesne profits and interest by true representatives—Title of the judgment debtor.

1373— C P C Ss. 144; (1) 47=(1882 Ss 583, 244) Decree — Sale in execution—Decree-holder's possession as purchaser-Sale set aside—Decree holder's claim for interest on the purchase-money.

The appellant purchased certain property put up to sale by auction, in execution of a decree obtained by him against the predecessor in title of the respondents, and obtained possession of the same. The purchase-money was set off against the amount due under the decree which contained no provision for future interest on the amount decree. The sale was ultimately set aside for irregularity. Subsequently, the respondents paid to the appellant the sum found due to him by the decree; and possession of the property was restored to them. Then the respondents applied in execution proceedings for mesne profits and interest. The appellant contended that a separate suit was required and that he was entitled to interest in respect of his purchase money.

Held that the claim of the respondents to have the questions in dispute determined in the execution proceedings was justified by Ss 583 and 244, C P C 1882 and that the claim of the appellant to be allowed interest was absurd.

Munshi Prag Narain v Thakur Kamakhia Singh. 11 Bom L R 1200 P C=10 C L J 257=6 M L T 303=3 Ind Cas 798=19 M L J 599=13 O C 180=31 All 551=14 C W N 55.

5. PARTY ENTITLED TO ANY BENEFIT BY WAY OF RESTITUTION OR OTHERWISE

(1) Restitution

1374.—C P C Ss 144, 47=(1882 Ss 583, 244) Execution of decree.-

In execution of a decree obtained exparte the decree-holders realized from their judgment debtor some Rs 13,00. The judgment-debtor applied under section 108 of the Code of Civil Procedure to have the decree set aside. His application was at first dismissed, but on appeal the exparte decree was set aside. The suit was reheard, and was ultimately dismissed. Thereupon the successful defendant applied to the Court which had executed the decree against him for restitution of the money realized in execution of that decree.

Held, that the defendant's proper remedy was that which he had sought, namely by application in execution and not by separate suit. 22 All 79 Fol.).

Saran v Bhagwan 25 All 441=23 W N 100.

(5) Party entitled to any benefit by way of restitution or otherwise—*Concld.*

Notes:—Fol: 28 All 665=3 A L J 5:6=(1906) W N 141. Ref: 4 A L J 188; W N (1907) 90; 29 All 548.

(2) Restitution due in virtue of the modification in appeal of the decree of a rent court—Procedure.

1375—C P C Ss. 144 (1); 47=(1882 Ss, 583, 244)-Rent-Courts decree—*Held*, that although s. 583, C P C, might be applied by analogy to proceedings before Courts of Revenue under Act No XII of 1881 s. 244 could not be applied to such proceedings. The remedy, therefore of a person entitled to a refund in consequence of the reversal or modification on in appeal of a decree passed under Act No. XII of 1881 by a Court of Revenue is twofold both by means of an application in execution and by a separate suit. (3 W R P C 11 referred to.) **Masihulluh Kuar v Majidunnisa** **1903 A W N 207=26 All 149.**

(3) Restitution of property—Execution of decree.

1376—C P C Ss. 144 (1) 47=(1883 ss. 583 244) S. 244 does not apply in its entirety to proceedings had under s 583 for restitution of property taken in execution of a decree, which is reversed in appeal.(10 M I A 203; 9 W R 402, 4 Cal 625: 33 Cal 857 Ref.) **Matiram Marwari v Ramkumar Marwari** **35 Cal 265.**

6 RIGHT OF RESTITUTION ENFORCEABLE ONLY AGAINST PARTIES TO THE SUIT & NOT AGAINST THIRD PARTIES.

(1) Assignee of decree—Restitution to assignee in execution proceedings.

1377—C P C Ss. 144 (1) 47=(1882 Ss. 583, 244) Party—Representative—Decree-holder.

The assignee of a decree-holder is his representative within the meaning of section 244 and is a party entitled to the benefits (by way of restitution or otherwise) under the decree within the meaning of section 583 of the Code of Civil Procedure.

Section 583 must be read along with section 244 of the Code.

The Courts in India should place a wide and liberal construction on section 244 Civil Procedure Code. **Jamini Nath Roy v Debi Prasad Agarwala** **4 C L J 192=33 Cal 857.**

(6) Right of restitution enforceable only against parties to the suit & not against third parties—*Contd.*

Notes.—Ref: 35 Cal 265.

(2) Costs realized by assignee—Suit by successful appellants to recover from the assignee the costs realized by him.

1378—C P C S. 144 (1)=(1883 S. 583)-Causes of action-Assignment of decree for costs—Decree reversed in appeal.

Certain appellants in the High Court obtained from that court a decree dismissing the respondent—plaintiff's suit with costs. That decree for costs was assigned by the decree-holders and the assignee took out of court in execution thereof the money which had been paid in satisfaction of it by the judgment debtors. Subsequently that decree was reversed by the Privy Council and the plaintiffs obtained a decree in their favour with costs in all courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against them for their recovery.—*Held*, that the decree-holders had no cause of action for a suit to recover from the assignee the costs realized by him in the manner above described. The proper remedy is for the appellants to proceed against the assignees in execution of their decree by way of restitution. **Lalta Prasad v Sadig Husein.** **1902 A W N 47=24 All 228.**

(3) Assignee not party to appeal—Restitution in execution.

1379—C P C S. 144 (1)=(1882 S. 583)-Execution by assignee of decree.

Under s. 583 of the Code of Civil Procedure the decree of the appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal, it cannot be executed against a person who was no party to the decree of the Appellate Court and who has not derived any interest subsequent to such decree. (19 All 136; 20 All 139 Ref and fol). **B L Frizoni v Rajaram Narain Singh** **[illegible] C W N 426.**

(6) Right of restitution enforceable only against parties to the suit & not against third parties—Concld.

(4) Right to apply not confined to parties to appeal—Rights accruing during litigation

1380.—C P C S 144 (1)=(1882 S 583)—Restitution.—

It is not necessary that a person asking for restitution under S 583, C P C should have been a party to the successful appeal, if the appeal is in effect and substance in favour of such a party.

Under S 583, C P C the parties must be placed in the position they were, previously in irrespective of any other rights accruing to any of the parties during the litigation. **Gunga Prasad v Brojo Nath Das 12 C W N 642**

(5) Restitution against a person not party.

1381.—C P C S 144 (1)=(1882 S 583)

Under s. 583 restitution cannot be obtained against a person who was not a party to the decree passed on appeal. **Bhajju Lal v Ram Bharose 8 O C 115**

7 MISCELLANEOUS CASES.

(1) Application for execution of decree.

1382—C P C—(1908) S. 144 (1)=S. 583 of (1882)—(Act VIII of 1859, s.362).

An application for execution of the decree of an Appellate Court should be made to the Court which passes the first decree in the suit, irrespective of any previous order referring the case for execution. **Ram Jadub Sircar v Ameeroonissa Bibee. 13 W R., 27.**

(2) Defendant entitled to be restored to possession—Decree being reversed.

1383—C P C—Ss. 144 (1); 108=Ss. 583, 587.

Where the plaintiff was not put in possession by the Court process, but obtained possession from the tenants presumably by virtue of the decree, the decree having been reversed on appeal, defendant was entitled under Ss 583 and 587 to be restored to possession by the Court which passed the orignal decree. **Bhau v Hari. 1887, P J., 75.**

(3) Tenant not entitled to restitution as there is no decree in his favour.

1384=C P C—S. 144 [1] of [1908]=S. 583 of 1882—Restitution.

(7) Miscellaneous cases—Contd.

Where the mortgagee from one of two rival claimants to a *mutt* brought a suit for the recovery of rent against a tenant of some mutt lands to which the other claimant was made a party-defendant, and the tenant paid the money into Court to be given away to the person found entitled, and the plaintiff obtained the money in consequence of a decision in his favour by the Appellate Court, which, however, was reversed on second appeal preferred by the rival claimant making the tenant and the plaintiff respondents: *Held*: in an application by the tenant for restitution of the money paid over to the plaintiff, by *Best, J.* that the tenant was not entitled to restitution as there was no decree in his favour but only in favour of the rival claimant: *By Muthusami Aiyar, J.*, that the payment by the tenant into Court having been in favour of the rightful claimant, an erroneous order of the Court, directing payment to the wrong party, can only be rectified at the instance of the person rightfully claiming it. **Haji Kasim v Jurni Deog. 4 M L J 1.**

(4) Order refusing restoration of property sold—Proceeds rateably distributed—Amount paid in rateable distribution, held in—Excess of amount—Petition to restore property sold.

1385—C P C—Ss. 144 (1); 115,=(1882 Ss. 583, 622)-Restitution-Appeal—Amount paid in rateable distribution held in appeal to be in excess of amount due.

The District Judge ordered rateable distribution of the proceeds of an execution sale between petitioners and counter-petitioners and distribution took place. The High Court found on appeal that the counter-petitioners were entitled to a less amount than they received. The counter-petitioners themselves were purchasers of certain items and the sale proceeds of those items were in excess of the sum found due to them. Petitioners applied for cancellation of the sale of these items purchased by counter petitioners in restitution. The District Judge held that the sale was valid and that petitioners were entitled only to the excess amount. *Held* the order of the District Judge was not a decree, nor was there an appeal in any sense from his order. Nor could the High Court interfere in revision under s. 622 with the District Judge's order though illegal, there being

C P C (1908) S.144=(1882 S.583)-*Concld.*

(7) Miscellaneous cases—*Concld.*

no want of jurisdiction or material irregularity in its exercise. (25 Bom 337 ref to 11 I A 237 and 11 Mad 220, 16 I A 104 ref to). *Semble:* That the sale being for a sum in excess of the sum due is illegal. There can be no doubt that the sale was illegal in so far as it was unnecessary. The court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the court by its erroneous action had displaced them from it. (10 All 166 referred to). **Parasurama Aiyar v Seshaier.** **27 Mad 504.**

C P C (1908), S. 144 (1)—Money-decree—Right to recover mesne profits.—See C P C (1908) O. 21 r. 53, Case No. (2533). **24 Mad 342.**

C P C (1908) S. 144—When party may be put in immediate possession of land, the subject matter of suit.—See C P C O. 39 r. 9, Case No. 2931. **6 C W N 710.**

C P C (1908) S. 144—Applications for such orders to be after notice.—See C P C O. 39. r. 8. Case No. 2930. **6 C W N 710.**

C P C (1908) S. 144—Reversal or modification of decree on ground, common to all.– See C P C O. 41 r. 4, Case No. 2982. **18 M L J 39.**

C P C (1908) S. 114—Stay of execution by Appellate Court.—See C P C O. 41 r. 5, Case No 3013. **33 Cal 927.**

C P C (1908) S. 145=S. 253 of 1882.

Notes:—This section corresponds with section 253 of the C P Code of 1882. The changes introduced in this section will appear on a comparision of this section with section 253 of the old Code, which is reproduced below: The proviso to this section is almost similar to that of the old section.

"*Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant*".

On a comparison of this section with section 253 of the old Code, it would appear, that section 253 of the old Code was applicable only to persons who became liable as sureties prior to the passing of a decree in the original suit, and not to persons who became sureties after the passing of the decree in the Appellate Court. But the language of the present section is wide enough to include the cases of persons who become sureties either before or after the passing of the decree in the Appellate Court or in execution or other proceedings.

Under the old Code there was much diversity of judicial opinion with regard to the mode of enforcement of surety bond. In some of the cases under the old Act, it was held that it could be enforced summarily in execution proceedings; and in others it was held, that surety bond could be enforced only by a separate suit. The question has been set at rest by the present section which provides that to the extent to which he has rendered himself personally liable, the decree or order may be executed against him summarily in execution. Under the old Code, there were two classes of *surety*, namely, (1) a person who before the passing of the decree in the original suit became surety, (2) a person who became *surety* after the passing of the decree in the original suit, either in the execution proceedings, or in the Appellate Court. But the distinction seems to have been done away with by the present section, adopting the principle laid down in the Punjab Full Bench Case noted below.

But where a surety bond is executed hypothecating immoveable properties, such a bond cannot but be enforced by a separate suit.

The present section has also given the surety the right of appeal against any order that may be passed against him, by insertion of the words "*that the such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47* ".

This section seems to have been framed adopting the principle laid down in the Full Bench case of 109 P R 1906, of the Punjab Chief Court. In that case it has been held that no distinction could be drawn between the case of a surety who, before the passing of a decree in an original suit, has become liable as such for the performance of the same, as well as, that of a surety who has given security for the costs of an appeal, both of whom might be proceeded against in execution, under sections 253 and 549 of the C P Code, 1882, respectively, and a surety who has given security, for the performance of the Appellate Court's decree, under section 545 of the C P Code, 1882, who could, therefore, as well be proceeded against summarily in execution as the other sureties above referred to. The above Full Bench ruling clearly explains the meaning of the present section.

Sureties for due performance of appellate decree.—See Order LXI, rules 5 & 6.

—S. 145 (1908)=S. 253 (1859, S. 204).

See Cases under Surety.

C P C (1908) S. 145—Decree — Execution surety-Surety-bond-Liability of the surety under the bond-Suit can lie to enforce liability—Practice—Procedure.—**See** C P C (1908) S. 47, Case No. (641). **13 Bom L R 909.**

C P C (1908) S. 145—See C P C (1908) S. 2 cl. 2, Case No. (15). **104 P R 1886.**

C P C (1908) S. 145—Decree — Execution proceedings against a surety.—**See** C P C (1908) S. 47, Case No. (190). **30 Bom 506.**

C P C (1908) S. 145—Method of enforcing security-bond.—**See** C P C (1908) S. 144, Case No. (1349). **4 L B R 197.**

C P C (1908) S. 145—See C P C (1908) S. 2 cl. 2, Case No. (31). **A W N (1890), 85.**

1386—C P C (1908) S.145—**Surety-Personal liability—Execution of decree.—See**

8 Ind Cas 985.

1387—C P C (1908) S. 145—Decree passed jointly-Surety-Execution against-C P C.S 253:-

A decree executable against a surety in virtue of the provisions contained in S. 253, C P C, is not a decree "passed jointly" within the meaning of Explanation to Art. 179 of the Limitation Act; and consequently, a prior application for execution against a judgment-debtor cannot go to keep alive the execution against the surety. Expl. 1 to Art. 179 of Sch. II refers to the decree which is "passed jointly" against more persons than one, and does not refer to a decree which may be jointly deduced, by combining the surety bond and the provisions of S. 253 with the decree in dispute.— **Narain v. Timmaya,**

[illegible] Bom L R 807=31 Bom 50.

1388—C P C (1908) Ss. 145, 55 (=Civ. Pro. Code, 1882, ss. 253, 336)—Liability of sureties—Bond to produce judgment-debtor.—

Held, that where a security-bond did not make the sureties liable for the performance of the decree or any part thereof, but only for production of the judgment-debtor before the Court, ss. 253 and 336 of the Code of Civil Procedure did not apply. **Panna Lal v. Mukhtar,**

A W N 1900, 156.

1389—C P C (1908) S. 145=(1882 S. 253)—Decree—Execution - Surety-Notice to the surety —Executing Court.—

The notice to a surety, required by the proviso to S. 253 of the Civil Procedure Code, 1882, can be given by the Court which passed the decree, as also by the Court executing the decree. The expression "the Court" in the proviso includes the Court by whom the decree may be executed as directed in the previous part of the section.

The intention of S. 253 of the Code [illegible] to be that when a person has made himself liable as a surety for the performance of a decree passed against another, he must have notice in writing that the decree is going to be executed against him, and it is immaterial whether such notice is given by the Court which passes the decree or by the Court to which it is sent for execution. **Lakhmishankar v. Raghumal,**

6 Bom L R 657=29 Bom 29.

1390—C P C (1908) S. 145—Stay of execution—Security — Future litigation concerning validity of security, whether barred by. — **See** Civ. Pro. Code, 1908, O. XLI, rr. 5, 6.

1391-1392—C P C (1908) S. 145—Res judicata on question of law—Erroneous opinion on a point of law how far conclusive:—

An erroneous opinion on a point of law may be *res judicata* between the parties to it.

The conflict between the cases. 8 Bom L R 367 and 12 Bom 411 indicated.—

Waman Hari v Hari Vithal, [illegible] Bom L R 632

=31 Bom 128.

C P C S. 146.

Notes:—This section is new, there was no similar provision in the old Code of 1882. It has been framed to set at rest the conflicting rulings of the Allahabad, Madras and Calcutta High Courts. In 21 All 374 and in Mad 361, it was held that when a defendant against whom an [illegible] *parte* decree has been passed, dies, his re-

CP C (1908) S. 146-*Concld.*

presentative is not competent to set aside the *ex parte* decree. But in 29 Cal 33, the Calcutta High Court, and in 29 All 574, a contrary view has been taken. This section has adopted the principle laid down by the Calcutta High Court. Again there were conflicting rulings under the old Code as to whether the expression *certified purchaser* in section 317 (section 66) includes his representatives; but this section has the old Code, set at rest the conflicting rulings by adopting the principle laid down in 31 Bom 61: 8 Bom L R 873.

C P C S. 147.

Notes:—This section is new. It has been framed in accordance with the principles laid down in the several rulings of the High Courts and of the Privy Council. In 7 C W N 90, it has been held that every person acting as a next friend or guardian for the suit to a minor to take the leave of the Court before entering into an agreement or compromise on his behalf, and no exception is made in the case of a certificated guardian. The policy of the law being to protect minors from being taken at a dis-advantage by their guardians. In order that a compromise may be binding upon a minor, leave of the Court must be express and it must be arrived at upon the exercise of a judicial discretion as to the propriety of the compromise in the interests of the minor. See also 17 All 531; 21 Mad 91 and 29 Mad 104. In 28 All 585: 4 C L J 8: 10 C W N 89: [illegible] Bom L R 489: 16 M L J 291, their Lordships of the Privy Council held that in order to maintain the validity of a compromise entered into on behalf of a minor when such compromise is subsequently challenged, it must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on a petition, or in some way not open to doubt, that the leave of the Court was obtained.

This section is to be read with Order XXXII, Rule 7, which corresponds with section 462 of the C. P. Code of 1882.

C P C s 148.

Notes.—This section is new. It is intended to enlarge the discretion of the Courts. This section has set at rest the much debatable point which hitherto existed, as will appear from the following rulings.

C P C (1908) S. 148-*Contd.*

After the expiry of the time originally fixed for amendment of plaint, the Judge has discretion to extend the time. 16 Bom 263. See also 19 All 240; 17 Cal 512 P C and; 31 Cal 75.

Where an action is taken by a Court under sec. 10 of the Court Fees Act, the Court is not bound [illegible] in the case of action taken under sec. 54 C P Code to fix a time within the period of limitation for the suit, for payment of deficit Court fees. Sec. 54 C P Code, 1882 (Or. VII; r. 11) and sec. 10 of the Court Fees Act have reference to different stages of a suit. (27 All 197: 2 Mad. 308, followed; 15 All 65 and 129, distinguished, and 24 All 218 referred).

C P C S. 148 (1908) -Court Fees Act. 1870 S. 28.

1393.—C P C S. 148 O 7 r. 11 (S. 554)—Plaint insufficiently stamped—Court allowing time to put deficit fees—Extention of time—Lapse of original period—Civil Procedure Code (Act XIV of 1882) S. 54—Rejection of plaint—Civil Procedure Code (Act V of 1908), S. 148—Power of Court—Court Fees Act (VII of 1870) S. 28.

A plaint was filed on the 8th February, one day before the prescribed time limit on insufficient stamp. The Court granted one week's time for making up the deficit. The deficit was put in on the 16th, one day too late. The Court ordered an application for extension of time by one day to be put in. Such application was made on the 18th and the plaint ordered to be registered: *Held*, the suit was in time. The Court was quite competent to extend the time originally fixed even after such period had elapsed, 16 Bom 263 foll. S. 148 of the new Code of Civil Procedure is legislative recognition of the rule that the Court has such power. *Held*, further S.54 is not mandatory and the Court is not bound in all cases to reject the plaint. **Amir Hossain Khan v. Nanak Chand. (1910) 12 C L J. 62.**

18[illegible]—C P C Ss. 148, 149—Enlargement of time by Court—Court-fee, power to make up deficiency of—Small Cause Court—Registrar, power of, to enlarge time.

Where the Court in its discretion called upon the plaintiff to pay the deficiency of Court fee within a time fixed by it but that order was not carried out,

C P C (1908) S. 148-*Contd*

Held, that S. 149 did not assist the plaintiff, and if the deficiency was paid after the period of limitation the suit should be dismissed.

S. 149 of the C P C 1908, has not brought about any change in the law so as to entitle a plaintiff, who has obtained time under S. 149 and has failed to carry out the order of the Court, to make up the deficiency of Court-fee on a subsequent day without an order for enlargement of time under S. 148.

The Registrar of a Small Cause Court is not competent to make an order under S. 148 of the C P C 1908, for enlargement of time. (6 Ind Cas 424, 12 C L J 62, 14 C W N 882 Diss: 31 Cal 20: 4 C L J 421; 11 C W N 38: 1 M L T 355 (F B) 27 Cal 376, 2 C L J 40, 9 C W N 344, Fol)
Budhan Shah v. Sita Shah.

7 Ind Cas 578.

1395.—C P C S.148—Modification of decree, it can be made by first Court after appeal preferred.

S. 148 of the new Civil Procedure Code does not authorise the first Court to modify the decree or extend the time allowed by it for the execution of a *kabuliyat* after an appeal has been preferred from that decrre.

The only Court which can pass such order, after an appeal has been preferred, is the appellate Court. **Mohunt Parmanand Das Gossain v. Kripasindhu Roy. 14 C W N 584 =6 Ind Cas 275=37 Cal 548**

1396.—C P C Ss.148, 152, O 20 r 3—Enlargement of time by Court—Power of Court to enlarge time subsequent to decree.

Held, that S. 148 relates only to proceedings antecedent to a final decree; and once a final decree is signed it cannot be altered except under S. 162 or Order XX, Rule 3 or those relating to review of judgment, except in cases in which power to grant further exteution of time has been expressly reserved to the Court. **Narendra Bahadur Singh v. Ajudhia Prasad.**

13 O C 28=5 Ind Cas 443.

1397.—C P C S. 1908 S. 148—Extension of time-Decree for redemption.

S. 148 of the Code applies to cases in which is extended the time fixed by the Code for the

C P C (1908) S. 148-*Contd.*

doing of some act and not to the extending of the time fixed by a mortgage-decree for the payment of a prior mortgage.

When the plaintiff in a redemption suit, who has obtained a decree, makes a *bona-fide* mistake in calculating the interest and deposits less than he ought to deposit, there is a good cause for extension of time for payment of the mortgage money. **Het Singh v. Tika Ram,**

9 A L J. 381.

1398. C P C S. 148—Award made after expiry of time fixed by Court-Application for extending time to file award.

The Court has not power to enlarge the time for the making of an award when the time has passed and the award has already been made (13 All 300. Foll.).

If the time had expired and no award has been made S. 148 Civ Pro Code no doubt gives the Court power to extend the time for the making of the award notwithstanding that it had expired at the time of the application. But that section does not enable the Court to extend the time for the doing of a particular act when in truth and in fact the act has already been done. **Shib Kishna Daw & Co v Satish Chunder Dutt. 38 Cal 522.**

1399.—C P C S. 148.-Mortgagee-Decree-Time for fixed payment of a prior mortgage—Payment not made within time, effect of—Transfer of Property Act (IV of 1882), S. 93—Civ Pro Code [Act V of 1908, Ss. 148, 151.—Extension of time fixed in a decree.

A mortgage decree was passed in 1898. The decree fixed a time within which the decree-holder has to pay a certain sum to a prior mortgagee. In case he failed to pay the decree further provided that the suit would stand dismissed. The decree-holder did not pay, within the time fixed. He however deposited the money in Court after the expiry of the time and the Court allowed the prior mortgagee to withdraw it. Some six years after the decree-holder applied for a decree absolute.

Held, [1] that the action of the Court in accepting the money deposited by the decree-holder after time and giving it to the prior mortgagee was purely mechanical. It did not extend the time for payment to the prior mortgagee.

[2] that the effect of non-payment to the prior mortgagee within time was under the decree to let the whole suit stand dismissed against all the parties, the mortgagor and the subsequent mortgagees including.

[3] that under S. 93 of the Transfer of Property Act 1882, the Court was not bound to extend the time fixed for payment of the decretal amount.

(4) that the High Court could not extend time under S. 148 or S 151 of the Code of Civil Procedure 1908, as S. 148 relates only to proceedings antecedent to the passing of a decree and was not intended to enable the Court to extend time in pre-emption and redemption cases, and S. 151 has no application to the present case. (19 Mad 249; 23 I A 32; 13 All 432 Ref. A W N (1902) 126; 24 All 44; A W N [1907] 137; 29 All 481; 4 A L J 147; Dist:) **Batuk Nath v. Munni.** **7 Ind Cas 36.**

1400—C P C S. 148—Liability incurred under the Old Code—Pre-emption suit.

Where a decree for pre-emption directed that the consideration for the sale should be deposited within a certain time which expired after the coming into operation of the New Code of Civil Procedure: *Held* no extension of time could be granted. **Jug Ram v Jewa Ram.** **(1909) 6 A L J 647=3 Ind Cas 497.**

1401—C P C S. 148 (1908)—Effect of not paying pre-emption money within the the time allowed by the decree—Tender to Nazir after Court hours not sufficient—Incompetency of Court to extend time—S. 148 C P C 1908—Ultra vires.

Held, that a pre-emption suit stands dismissed, if the pre-emptor fails even by mistake, to deposit whole of the pre-emption money payable under the pre-emption decree into Court within its usual working hours on the day fixed for its payment by the said decree; and that neither the first nor the appellate Court has power to extend the time—S. 148 of Act V of 1908 does not apply in such a case.

A tender in whole or part of the pre-emption money to the Court Sheriff after its usual work-

ing time is not sufficient to save the decree. **Muhammad v Charag.** **140 P W R 1910=** **[illegible] Ind Cas 812=22 P L R 11**

C P C S. 149.

Notes—This section is new. It has been enacted to enlarge the discretion of the Courts and to set at rest the several conflicting rulings which hitherto existed on this point – The recent case of 29 All 749 . 4 A L J 656 : A W N (1907) 253 has adopted the rule laid down in this section. This section has nullified the following cases 1 All 129, F B; 16 All 65 ; 33 All 123 ; 24 All 218 ; 27 All 411 and 28 All 510.

S. 149=1882 s 582A.

See (1) Limitation Act, s. 4

(2) C P C S. 148, Case No (1394). 7 Ind Cas 578.

1402—C P C s 149 (1908)—Insufficient duty on plaint and memorandum of appeal—High Court's order to pay the proper duty—Civil Procedure Code (XIV of 1882), s. 582A Effect of s. 582 A on defective plaint.

In a suit for cancellation of a sale deed, the plaintiff paid on the plaint and on the memorandum of appeal to the lower appellate Court a stamp duty of Rs. 10 as if for a suit for mere declaration, it was contended that even if the defect in the appeal could be cured under sec 582A there was no proper plaint before the first court and that the suit was barred by limitation when the deficient stamp duty was paid. *Held*, that both the plaint and the memorandum of appeal would, on payment at the requisition of the Court, of the deficient stamp duty be as good as if it were originally stamped properly and that the suit was not barred.

Valambal Ammal v Uythilinga Madaliar. **11 M L J 119=25 Mad [illegible]=24 Mad 331**

C P C S. 150

Notes.—This section is new. It has been framed to meet the difficulties which some times arise on account of the abolition of any Court, or the transfer of any local area from the jurisdiction of one Court to that of another in consequence of which the business of one Court is transferred to another Court.

C P C (1908) S. 151.

Notes:—This section is new. It is intended to save the inherent power of Courts. The Code of Civil Procedure is not exhaustive as to the powers of a Court in matters of procedure. The Court in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure which binds Courts only in [illegible] far as it goes: the powers of the Court are not rigidly circumscribed by the provisions of the Code, and the Court has inherent power to make a particular order which is essential in the interests of justice, even where no section of the Code can be pointed out as a direct authority for it, where its decision is based on sound general principles and is not in conflict with them, or of the intention of the Legislature. See also 3 C L J 29; 3 C L J 67 : 33 Cal 927 ; 33 Cal 1094 : 10 C W N 719 ; 4 C L J 306 ; 5 C L J 611. See also cases noted in the beginuing of C P C 1908.

C P C S. 151.

1 General 1403—1404

2 Court's inherent power to prevent abuse of process 1405—1408

3 Court's inherent power to set aside exparte decree or order 1409-1414

1 General,

  1 Inherent power of High Court 1403

  2 Court not to override express provision of any law 1404

2 Court's inherent power to prevent abuse of process.

  1 Exercise of the powers—Court—Discretion 1405

  2 Application for declaration of insolvency dismissed—Fresh application barred without leave of court under rule 11—Abuse of process 1406

  3 Tenant raising title of third party—Remand by lower appellate court—Inherent powers 1407

  4 Receiver of deceased partner's estate—whether necessary party—Remand by appellate Court—Inherent power of court 1408

3 Court's inherent power to set aside exparte decree or order.

  1 Resistance by outsider to delivery of possession to decree-holder 1409

C P C (1908) S 151-*Contd.*

  [illegible] Dismissed a suit or default under misrepresentation—Inherent power to cancel that order 1410

  3 Stay of execution—Power of appellate court 1411

  4 Decree drawn up by mistake of court—Inherent power of Court 1412

  5 Review—Court overlooking an important plea—Custom 1413

  6 Appeal after remand-sub-judge cannot go behind remand order—Contingency not provided by legislature—Inherent power of Court 1414

—**S. 151**—Rule of procedure or substantive law—Inherent power of court, saving of—Applicability of. **See** C P C)1908) S. 141. Case No (1336) **3 S L R 128.**

– **S. 151**—Applicability and scope. **See** C P C O 9 r 9. Case No 1778. **9 A L J 666.**

—**S. 151**—Right of assignee to sue for refund of the price or for declaration of his right. **See** C P C O 21 r 16. Case No 2435. **13 Bom L R 973.**

—**S. 151**—**See** Review. **[illegible] Ind Cas 545.**

1 GENERAL.

(1) Inherent power of High Court.

1403—C P C—S. 151 (1908)—Inherent powers of High Court. **14 C W N 586 = 11 C L J 435 = 6 Ind Cas 95.**

(2) Court not to override express provisions of any law.

1404—C P C—S. 151 (1908) Court not to override express provisions of any law. **Execution of Decree.** **9 Ind Cas 246.**

2 COURT'S INHERENT POWER TO PREVENT ABUSE OF PROCESS.

(1) Exercise of the powers-Court—Discretion.

1405 –C P C—S. 151—Inherent powers of Court.

G obtained three money decrees against M in the Small Causes Court at Poona; and in execution thereof got attached a sum of money belonging to M and lying in the Court of the first Class Subordinate Judge at Poona. M's brother P then

C P C (1908) S.151-*Contd.*

(2) Court's inherent power to prevent abuse of process—*Contd.*

sued for and obtained a declaration that this money was not liable to be attached, G, in the meanwhile, withdrew the amount from the Court in satisfaction of his decrees. On P's application, the small Causes Court at Poona, in virtue of the powers reserved by S, 151 of the Civil Procedure Code, 1908, ordered G to repay the money into the First Class Subordinate Judge's Court at Poona.

Held, that an order could be made under S. 151, only if it was necessary for the ends of justice or to prevent the abuse of the process of the Court; and that it could not be said to be necessary for either purpose, because P had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court at Poona.

Ganesh Narayan v Purushottam.
11 Bom L R 1312=34 Bom135=1 Ind Cas 595

(2) Application for declaration of insolvency dismissed Fresh application barred without leave of Court under rule 11—Abuse of process.

1406—C P C S 151—S. 55 (3) and (4),—Sind Insolvency Rules, r. 11.

When the application of a judgment-debtor to be declared an insolvent has been once dismissed, and he is re-arrested in execution of decree against him, he is not entitled to a release under S. 55 (3) and (4) of the Civ.Pro. Code, on expressing his willingness to appeal again to be declared an insolvent, so long as the bar of the previous dismissal is not removed by obtaining leave of the Court under r. 11 of the rules under the Insolvency Act.

To allow a fresh application, without r. 11 being complied with, would result in abuse of the process of the Court contrary to the provisions of S. 151 of the Civ. Pro. Code. **Abdul Jabar v Sheikh Karim. 9 Ind Cas121**

(3) Tenant raising title of third party—Remand by lower appellate Court—Inherent powers.

1407—C P C—S. 151, O. 1, r. 10, O. XLI, r. 23—Rent-suit—Tenant raising title of third party —Necessary parties—Remand by lower appellate Court—Inherent powers. **See 11 Ind Cas 163.**

C P C (1908) S. 151-*Contd.*

(2) Court's inherent power to prevent abuse of process *Concld.*

(4) Receiver of deceased partner's estate, whether necessary party -Remand by appellate Court-Inherent power of Court.

1408-C P C S 151-Party-Suit for account by partner against representatives of deceased partner Civil Procedure Code (Act of 1908), S 151, O XLI R 23— Remand by appellate Court when suit not disposed of on preliminary point—In a suit to wind up a partnership business brought by one partner against the representative of a deceased it is necessary to join as party defendant the receiver appointed by competent Court to take charge of the estate of the deceased.

When a decree has been made by an original Court on a suit improperly framed by reason of the failure of the plaintiff to join a necessary party as a defendant, it is competent to the Court of appeal, under S. 151 of the Civil Procedure Code to set aside that decision and to remand the case for re-trial with directions to add all necessary parties. (6 Ind Cas 214; 14 C W N 653; 6 Ind Cas 63; 11 C L J 958, Ref, 18 All 131; 18 All 396; 23 All 167; 25 All 194, Ref.) **Tohra Bibi v. Zbaeda Khatoon 7 Ind Cas 75=12 C L J 368.**

3 COURT'S INHERENT POWER TO SET ASIDE EXPARTE DECREE OR ORDER.

(1) Resistence by outsider to delivery of possession to decree-holder.

1409 C P C S 151, O,XXI, rr. 97, 98, 99—inherent power of Court—Order for delivery of possession to decree-holder.

The inherent powers of a Court may be exercised in favour of or against a person, who is not a party to the original suit (16 Cal 109; 10 I A 171 Ref.) **Radhika Mohun v. Gyan Chandra 6 Ind Cas 120=14 C W N 836.**

(2) Dismissed a suit Or default under misrepresentation - Inherent power to cancel that order.

1410—C P C S. 151—Where a Court dismissed a suit or default under misrepresentation and

(3) Court's inherent power to set aside exparte decree or order—*Contd.*

by mistake; *Held* that it had inherent power to cancel that order, as soon as it was apprised of the fact, and to try the suit. (9 C L J 668; 3 M L T 41, Fol.) **Sri Adwaitanand Tirthoswami v. Basudeo Nand 6 Ind Cas 208.**

(3) Stay of execution—power of appellate Court.

1411—C P C S. 151, O. 21, r. 29. and O. 41, r. 5—In this Case, execution of a decree of 1907 was stayed pending decision of a counter case brought by the judgment-debtor, R B K against the decree-holder. That suit was dismissed and an appeal from this order of dismissal was presented to the Chief Court. R B K now prayed that execution of the decree of 1907 might be stayed pending decision of the appeal.

Held, that though the Case is not provided for by O. 21, r. 29 of the now Code (S. 243 of the Code of 1882), S. 151 of the new Code meets the Case and the Chief Court has powers to stay execution pending the appeal. (35 Cal 927; 130 P R 1908 Ref ; 41 P R 1904 not Fol.)

Sardarni Bhagwan v. Rani Harnam. 82 P R 1910 = 149 P L R 1910.

(4) Decree drawn up by mistake of court-Inherent Power of Court.

1412—C P C S. 151 (1908)—Partition suit—fee—Stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Decree validated from date of decree—*Civil Procedure Code* (Act V of 1908) S. 158-Stamp Act (II of 1899), S. 53, Sch. 1, Art. 45—Refund of value of Court-fee stamp. In a partition suit, the first Court directed the plaintiff to file a nonjudicial stamp of Rs. 100 for the decree to be drawn up thereon in accordance with Art. 45 of Sch. I of the Stamp Act. By mistake the plaintiff filed a Court-fee stamp of this value and by mistake the Court engrossed the decree on the same. The defendant appealed and the appellate Court could not detect the mistake. Then the plaintiff applied for execution of the decree in the first Court, where the defendant took the objection that the decree could not be executed not being drawn up upon a non-judicial stamp paper. The objection was allowed and the plaintiff moved the High Court.

(3) Court's inherent power to set aside exparte decree or order—*Contd.*

Held, that this is a fit case for the exercise of the inherent powers of the Court which have been saved by S. 151 of the Civil Procedure Code, that the plaintiff should be allowed to put in a non-judicial stamp of Rs. 100 which would be defaced and attached to the decree already drawn up and that this would be sufficient to validate the decree with retrospective effect from the date when it was drawn up, and the result would be to validate the appeal as well.

S. 52 of the Stamp Act does not cover a case in which a Court fee Stamp has been erroneously used where a non-judicial stamp ought to have been used under the provisions of the Stamp Act.

But the Revenue Officers, as a matter of indulgence, though not as a matter of right may grant relief to the person who has made the error. (5 Ind Cas 532; 37 Cal 399; 11 C L J 285 Fol. 23 All 215; A W N (1901) 1. Fol.) **Rafi-ud din v. Latif Ahmed. 7 Ind Cas 94 = 14 C W N 1101 = 12 C L J 324.**

(5) Review—Court overlooking an important plea-Custom.

1413—C P C S. 151—Alienation by sonless male proprietor—Acquiescence—Attestation of deed of sale by principal plaintiff.

It was pleaded *inter alia*, that the plaintiffs' suit for declaration that a sale made by a sonless proprietor would not affect their reversionary rights ought to be dismissed on the ground that the sale was made with the consent of the plaintiffs and one of the two plaintiffs who was a *lambardar* took an active part in negotiating the sale and assisted in the registration of the sale-deed. This fact was admitted by the particular plaintiff. In the Chief Court the plea was urged by the defendant but the Court overlooked it and a decree was passed against the defendant. On an applicatiob for review of the decree,

Held, that there was good ground for review to be granted and that the plea schould have been accepted and the suit dismissed. **Suuder Singh v Nihala. 26 P L R 1911 = 9 Ind Cas 545 = 42 P W R 1911.**

C P C (1908) S. 151-*Concld.*

(3) Court's inherent power to set aside exparte decree or order—*Concld.*

(6) Appeal after remand—Sub-Judge cannot go behind remand order Contigency not provided by legislature—Inherent power of Court.

1414—C P C—S. 151 (1908)—Jurisdiction—Remand by District Judge—Appeal after remand heard by Sub-Judge — Procedure—Inherent power of Court—C. P. C. (Act V of 1908), S. 151. —Estoppel—Tenant's defence that plaintiff as benamidar is not entitled to sue for rent, if permissible.An appeal was remanded by the District Judge. A decree was made by the first Court after remand and an appeal was heard by the Sub-Jadge against that decree.

Held, that, the Sub-Judge was not competent to go behind the remand order.

Where a contingency happens which has not been anticipated by the framers of the C. P. C, and therefore, no provision has been expressly made in that behalf, the Court has inherent power to adopt such procedure as would do substantial justice and shorten needless litigation.

In cases where the doctrine of estoppel does not come into play, it is open to the tenant defendant to urge that the plaintiff, as *benamidar* for the beneficial owner, is not entitled to claim rent from him.

The defendant was a tenant under A. The plaintiff claimed to intervene and to receive rent from the defendant on the ground that an intermediate tenure had been created in his favour by A.

Held, that,the defendant was entitled to question the title of the plaintiff and to assert that the plaintiff was *benamidar* for another person and was not entitled to sue for rent

Rahimunnessa Bibee v Mahadeb Das.

7 Ind Cas 846 =12 C L J 428.

—S. 151—Stay by Court which passed the decree.

See C P C O. 41 r 5. Case No 3019.

2 M W N 432.

C P C (1908) S 151—See C P C (1908) S. 115. Case No (1297). **10 M L T 451.**

S. 151—Question [illegible] to what was sold at execution sale—Inherent power of Court to certify mistake—Question of mistake. See C P C (1908) S. 47. Case No (801) **7 Ind Cas 91.**

C P C (1908) S 152=S. 206 of 1882

Notes—C P C—S. 152. This section corresponds with the third para. of s. 206 of the C. P. C of 1882 with some modifications. The following proviso, *viz.* "*Provided that reasonable notice has been given to the parties on their pleaders of the proposed amendment,*" which, contained in the third para of the old section, has been omitted and some other alterations have also been made as will appear on a comparision of the two sections.

S. 152 O. XX r. 6 =(1882) S. 206.

See Cases under.

(1) Appeal—Orders.
(2) Alteration or Amendment of Decree.
(3) Limitation Act, 1877, Art. 178.
(4) Superintendence of High Court—Civil Procedure Code, s. 115.

—S. 152—O. 20. r. 6=1882 S. 206.
See Decree-Form of decree-General cases.

67 P R 1887.

—S. 152—**See** C P C (1908) S. 148. Case No (1396). **13 O C 28.**

1415—C P C—Ss. 152. 153—Scope of —Decree. **8 N L R 13.**

1416—S. 152 and O. XLV, r. 13—Scope and effect—Decree—Alteration or amendment of decree. **See 11 C L J 155=5 Ind Cas 723.**

1417.—C P C S 152 (1908)= (1882) S 206—Amendment of decree—Power to amend decree—Jurisdiction :—

The proceedings under S 206 terminate in an order (which can be dealt with in revision by the High Court). An order passed under S 206 which makes additions in the decree not warranted by the judgment is beyond the jurisdiction of the court passing it.

Baishri Vaktuba v. Agarsingji Raisungji.

9 Bom L R 547= 31 Bom 447.

1418.—C P C S 152 (1908) S 248—Notice on application for amendment--Saving of limitation Application for amendment, no step in aid of execution :—

A notice under S 248 of the Code pre-supposes the presentation of an application for execution and the pendency of such an application in a court. Hence where a notice purporting to be under Sec 248 was issued on an application for amendment of [illegible] order absolute calling upon the

C P C (1908) S.152=(1882,S.206)-*Contd*

judgment-debtor to show cause why the amendment should not be made :—*Held*, that the notice [illegible] issued could not save the operation of limitation. An application for amendment of an order absolute is not an application to take a step in aid of execution. **Gulbibi v Dakhni Din**

2 A L J 287.

S. C. Ahsam-ullah v Dakni Din

1905 A W N 108=27 All 575.

1419.—C P C 152—O 20 r 6: S 115=(1882 Ss 206, 622)—Decree affirmed appeal—Amendment by Court—Effect—Appeal—Jurisdiction—Revision :

When a decree, after being affirmed on appeal, is amended by the original court under S 206, C P C and no step is taken to set aside the amended decree, the amended decree will be binding between the parties, and its validity cannot be challenged in execution proceedings on the ground that the original court had no jurisdiction to make the amendment. **Menat Ali v Amdar Ali.**

9 C W N 605.

Notes.—Ref 3 C L J 188. Ref ; 10 C L J 467.

1420.—C P C S 152. Ss 190, 110 ; O 20 r 6 : S 152=(1882 Ss 595,596, 506)—Charter Act Cl 39 —Order under S 202, C P C— "Order made in its final appellate Jurisdiction "

An order by the High Court rejecting an application for amendment of its own decree in appeal, is not an order *made on appeal* and no appeal lies to the Privy Council. *Quere.*—Whether such an order is one passed on appeal by the High Court in its final appellate jurisdiction and whether it is " final " (6 W R Misc. R 102. 10 W R F B 1 fol : 21 W R 205 not Fol:)

Sunder Koer v Chandishwa Prasad Singh.

30 Cal 679=30 I A 20.

Notes :—Fol : 32 Bom 108=9 Bom L R 506.

1421.—C P C S 152 —O 20 r 6: Ss 115 ; 114, O 47 r 1,(1882 Ss 206, 622, 683)—Order amending decree—Appeal—Second appeal—Review.

An order under Section 206, C P C, amending a decree is not a decree and no appeal lies against such an order, and the proper remedy is by an application under S 622, C P C. (7 All. 875, ref to and foll ; 6 Cal, 22 ref. to ; 25 Cal 258 dist. 8 All 377 and 11 All 314 explained.)

Nalinakshya (Raghu Nath) Ghoshal v Nabakshar Hosain Chowdhry.

[illegible] C W N 192=28 Cal 177.

C P C (1908)S.152=(1882,S.206)-*Concld*

1422.—C P C s 152. O 20 r 6=S. 206 of 1882.

Where a mistake was made in a consent decree, *held* that the proper way to correct it was by review or by regular suit and not under section, 206. **Lakshmi v Rupji.**

1896 P J 595.

1423.—C P C S 152=Civil Procedure Code (XIV of 1882) S 206.

A decree was passed on 31st December 1882. The 2nd defandant filed a petition for the amendment of the decree in respect of the costs, which was granted on 6th October 1893. On 6th July 1896 he applied for execution and again on 29th April 1898. *Held*, that the application was not barred as the order passed by the Court determining the amount of costs must be treated as a continuation or completion of the judgment, and the amendment was substantially a review of judgment and Art. 179 (3) of the second schedule of the Limitation Act Applies.

Venkatajogayya v Vankatasimhadri Jagapatirazu.

24 Mad 25.

Notes:—*Ref*: 10 C L J 467 ; 3 C L J 188.

—S 152—Effect of dismissal of appeal. See C P C O 41 r 11, Case No 3050.

30 All 290.

C P C (1908) s 153.

Notes—This section is new. It gives the Court general power to amend any defect or error in any proceeding in a suit. This section is intended to enlarge the discretionary powers of the Courts to order amendment, at any time of any defect or error in any proceeding in a suit.

As to Court's power to allow the parties to amend the pleadings, see Order VI., rules 17 and 18.

As to Court's power to amend issues, see Order XIV, r 5.

C P C (1908) [illegible] 153—See C P C (1908) S. 152. Case No. (1415). **[illegible] N L R 13.**

C P C S 154 of 1908=1882 S 3.

See Cases under:—

1 Appeal—Right of Apeal, Effect of Repeal on.

2 Execution of Decree-Effect of change of Law pending Execution.

C P C (1908) S.154=(1882,S.3)-*Concld*

1424.—C P C S 154, O XLIII, rr i (a). 23 'Present right of appeal,' meaning of—Right *in esse* not affected by new law. **84 P W R 1912.**

1425.—C P C S. 154—Effect of, on right of appeal. **9 M L T 259.**

1426—C P C S. 154 and O XLI, r 33—Appellate Court, power of—Making decree in favour of party not made party in lower Appellate Court—Right of appeal, saving of, when new Code came into force— Pending cases—Procedure.

Under rule 33 of Order XLI of the Civ Pro Code, 1908, the High Court is competent to make a decree in favour of a party in [illegible] second appeal, although such party was not made [illegible] party in the appeal before the lower appellate Court.

When the new Civil Procedure Code, came into force, it applied so far as procedure is concerned, to all cases which were then pending or to be instituted.

S 154 of the Code means that nothing shall *prejudicially* affect any present right of appeal. It can have no bearing on the powers of an appellate Court in dealing with appeals before it. **Abdul Aziz v Shaik Momin. 9 Ind Cas 815.**

C P C 1908 S. 156=1882 S 3.

Notes:—This section corresponds with the second sentence of section 3 of the C. P. Code of 1882, with modifications and alterations.

After the new C. P. Code (Act V of 1908) comes into operation questions may arise, as to whether the suits and proceedings commenced and pending, before the 1st day of January 1909, are to be governed by the provisions of the old or of the new Code, it therefore seems desirable, for the sake of convenience, and easy reference to reproduce here, section [illegible] of the General Clauses Act X of 1897, with rulings, by the provisions of which, the questions shall have to be determined.

Where this Act, or any Act of the Governor-General in Council or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

C P C (1908) S. 156=(1882,S.3)-*Contd*

(*a*) revive anything not in force or existing at at the time at which the repeal takes effect ; or

(*b*) affect the previous operation of any enactment so repealed, or anything duly done or suffered thereunder ; or

(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed ; or

(*d*) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment, as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed [illegible] if the repealing Act or Regulation had not been passed.

See cases under :-

1 Right of appeal, Effect of repeal on.

[illegible] Execution of decree——Effect of change of law pending execution.

1427—C P C S 156.

It is now generally settled that in matters of procedure an *Amending* Act would affect legal proceedings instituted under the repealed provision. **Rahimuddin v Jagat Kishore 12 C W N 987.**

1428—C P C S 156=S. 3 of 1882.

The word " any proceedings commenced" in s. 6 of Act I. of 1868 include an appeal against [illegible] decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. **Hurro Sundari v Brajohari Das. 13 Cal. 86.**

Notes:—Referred to in 14 Cal. 636 ; 16 Cal. 267, F. B. Approved in 15 Cal. 107. Explained 16 Cal. 431.

1429C P C S 156—Effect of repeal.

Held, notwithstanding the provisions of s. 6, Act 1 of 1868, and the attachment of lands before the coming into operation of Act XIV of 1882, that the order for sale, having been made subsequently was illegal, and should be set aside. **Shivram v Khondiva. 8 Bom 340.**

Notes:—Referred to in 14 Bom. 521, and in 16 Cal. 267, F. B. See also 24 Cal. 399.

C P C (1908) S.156 = (1882, S.3)-*Contd*

1430—Civil Procedure Code Section 156.

Held that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII of 1859, was not entitled, under Act X. of 1877 to be released on the coming into operation of the latter Act, if he had been imprisoned for more than six months, but less than two years. **Ratansi Kalianji. 2 Bom. 148 F B.**

Notes:—Referred to in 2 All. 82. 5 Bom. 659. 6 Bom. 90, [illegible] Bom. 581, 11 Bom 472, 12 Bom. 453, 14 Bom. 520, and in 16 Cal. 267, F. B. Followed in 1 All. 668, and 9 Cal. 446.

1431—Civil Procedure Code Section 156.

Proceedings in execution were commenced when Act VIII of 1859 was in force, but the property of the judgment-debtor was sold in pursuance of those proceedings, after Act X of 1877 came into operation. Subsequently the Court made [illegible] order setting aside the sale. *Held* that the order was governed by the former Code, and was therefore not appealable.

Chinto Joshi v Krishnaji Narayan.
3 Bom 214. See also **2 All 735.**

See, however **Harbans Sahai v Bhairo Purshad 5 Cal 259 4 C L R 23.**

Notes.—Referred to in 8 Bom. 291, 12 Bom 453, and in 16 Cal. 267.

1432—Civil Procedure Code Section 156.

A decree-holder attached property while Act VIII of 1859 was in force, but the property was sold after Act X of 1877 came into operation. After the sale another decree holder applied for rateable distribution. *Held* that the prior attaching creditor by his attachment under the Code of 1859 acquired, under s. 270 of the Code, a right to have his decree first satisfied in full, and that he was not deprived of this right by the change in the law introduced by s. 295 of the new Code of 1882. **Narain Das v Baimancha 3 Bom 217.**

C P C S 156—
See Cases under.
C P C (1908) S 154.

1433—Civil Procedure Code Section 166.

It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. **Anund Chunder v Netai Bhoomiji, 16 Cal 429.**

1434—Civil Procedure Code Section 156.

Execution of decree obtained under Bengal Rent Act VIII. of 1869, is after the passing of Act VII of 1885, to be governed by the latter Act. **Uma Soondary v Brojonath 15 Cal 347.**

C P C (1908) S. 156 = (1882 S. 3)-*Contd.*

1435—Civil Procedure Code Section 156.

An appeal having been declared abated under section 368, C P Code of 1877, an application to set aside the order was made after the C P Code of 1882 came into force, *held* that the application must be disposed of under the Code [illegible] it stood at the date of the application. **Suri Bhatta v Sitarama 7 Mad 195.**

1436—C P C S 156—Construction of Statute—Effect of Act, not creating new rights—Execution of decree. (14 Cal 676, F B. 15 Cal 383; 21 Cal 940 F B, overruled).

Jogodanand v Amrita Lal 22 Cal 767 F. B.
See also 18 Mad 477.

1437—Civil Procedure Code Section 156.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments unless in express terms they apply to pending actions do not affect them. An exception to this general rule is where enactments merely affect procedure but do not extend to rights of action. **Vedavalli Narasiah v Mangamma 27 Mad 538.**

1438—Civil Procedure Code Section 156.

Where an application for execution was made before Act XII of 1879 [amending Act X of 1877] was a passed but was disposed of after that Act came into force: *Held* that the Act, as amended, was the law to be applied. The rule is that when an enactment deals with procedure only, it applies to all actions, pending as well as future. See however 2 All. 786. **Papa Sastrial v Anantaram Sastrial 3 Mad. 98.**

Notes.—Appl in 7 Bom. 463. Ref to in 12 Bom 453.

1439—Civil Procedure Code Section 156.

A surety-bond executed under s. 549, C P Code of 1883, before the passing of Act VII of 1888 may be summarily enforced in execution after the coming into operation of the said Act. **Abdulwahid v Fareedunnissa 16 Cal 323.**

1440—Civil Procedure Code Section 156.

Held that the proceeding commenced under the Indian Companies Act (X of 1866) was not affected by the repealing Act VI of 1882 by virtue of the provisions of s. 6 of Act I of 1868. **West Hope Town Tea Company 11 All 349.**

1441—Civil Procedure Code Section 156.

Under s 6 of Act I of 1868 the repeal of the Limitation Act (IX of 1871) by Act

XV of 1877 did not affect any proceedings commenced before the repealing Act came into force. **Behary v Gobardhan** 9 Cal 446= 12 C L R 431.

Notes.—Doubt 9 Cal 644. Ref. to 7 Bom 459 and 16 Cal 267 F B. Dissented from 10 Cal. 748 and 11 Cal 55.

1442—By s 6 of Act I of 1868 a suit is to be governed by the Registration Law in force at the time of the institution, and not by that which may be in force when it comes on for hearing. **Ugra Singh v Ablaki Koer** 4 Cal 536; 3 C L R 464.

Notes.—Referred to 2 All. 851 4 All. 229, 6 Bom 190, 13 Bom 232, and 7 Cal 570.

1443—Repeal of Registration Act (VIII of 1871) by Act III of 1877.—Under the provisions of s 6 of Act I of 1868 proceedings must be governed by the Act in force at the time when they are instituted. **Mohomed Hossein v Hadzi Abdullah** 3 Cal 727.

Notes.—Referred to 16 Cal. 267 F B; See also 24 Cal 399.

1444-C P C S 156-The word 'proceeding' in s. 6 of Act I of 1868 as applied to a suit means the suit as an entirety that is down to the final decree. A second appeal, therefore, on a question of the amount due as rent will not lie when the suit was instituted previous to the passing of Act VIII of 1885 although the judgment was delivered and the first appeal heard subsequently to the passing of that Act. (13 Cal. 86 approved). **Satghuri v Mujidan** 15 Cal. 107.

Notes:—Over: 22 Cal 757 F. B.

1445-C P C S 156-Act I of 1868,s 6-Retrospective enactment when applicable to pending suits. Section 21 (2) of the Bengal Tenancy Act (VIII. of 1885) is expressly retrospective, and applies to suits pending at the date of the commencement of the Act. **Tapsee Singh v Ram Saran** 15 Cal 376. **See also Jogessur v Aisadi** 14 Cal 553.

Notes:—Over: 22 Cal 767 F. B.

1446-C P C S 156-The provision of Act which creates a new right cannot in the absence of express legislation or direct implication, have a retrospective effect. *Held* accordingly that a judgment debtor's right under s.174 of the Bengal Tenancy Act to set aside a sale did not avail where the sale was held in pursuance of a decree, the execution whereof had been applied for before that Act came into operation. **Lal Mohun v Jogendra Chunder.** 14 Cal 636. F B.

Notes.—Applied 15 Cal 383, and 21 Cal 940 F B. Overruled: 22 Cal 767 F B. See also 18 Mad 477.

1447-C P C S 156-Where a suit is brought after the date of the Transfer of Property Act (IV of 1882) for the foreclosure of a mortgage dated previous to the Act the procedure to be followed is that given by the Transfer of Property Act. (6 All 262 approved.)

Bhobo Sundari v Rakhal Chunder. 12 Cal 583. **But See 12 Cal 436.**

Notes—See also 13 All 432, 11 Cal 58, and 13 Mad 502.

1448-C P C S 156-In a suit for foreclosure brought after passing of the Transfer of Property Act (IV of 1882) where notice was served while Reg XVII of 1806 was in force, *held* that proceedings having been commenced under the Regulation those proceedings were saved by s. 6 of Act I of 1868. The word proceedings in s. 6 includes ministerial proceedings, as the service of notice of foreclosure. (14 Cal 599 followed).

Umesh Chunder v Chunchun Ojha. 15 Cal 357.

1449-C P C S. 156-Offence committed before the Penal Code came into operation.—By s. 6 of Act I of 1868 the repeal of an Act does not affect any thing done, or any offence committed, or any fine or penalty incurred, before the repealing Act shall have come into operation.

Empress v Mulna. 1 All 529.

See however, 2 Cal 225 F. B. in which it was held that s. 6 of Act I of 1868,which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, is not applicable.

1450—C P C Ss. 156, 157 and 158 of 1908= 1882 S. 3—Repeal of C. P. Code 1859—General Clauses Consolidation Act I of 1868, s. 6.—

In all cases pending when the Act X of 1877 came in force in which an appeal lay to the High Court under the repealed procedure, an appeal still lies even though the old Procedure is repealed. Per Garth C. J.—A suit is a judicial proceeding and the words " any proceeding " in S. 6 of Act I of 1868 include all 'proceedings in a suit from its institution to the final disposal, and therefore proceedings in appeal also are included. The words procedure in s. 3 Act X of 1877 had not the same meaning as the word proceedings in s. 6 Act I of 1868. The proceedings in a suit instituted before the C P Code 1877 came into force, including the special appeal when the old procedure allowed it, so on to the end of the suit, notwithstanding the repeal of the Code. The procedure applicable is the new procedure.

Runjit Singh v. Meherran Koer, 3 Cal 662.
Burkut Hossein v. Majidoonnissa, 3 C L R 208.
Nadir Hossein v Bissen Chand Bassarat 3 C L R 437.

Notes:—Appl: 13 Cal 86. Fol: 3 C L R 208; 4 C L R 23; 5 Cal 259. Ref: 4 C L R 18; [illegible] Cal 825; 16 Cal 267 F B; 22 Cal 364; 12 Bom 449; 5 C L J 550; 34 Cal 636.

1451—C P C Ss. 156, 157, 158—Standing timber is immoveable property within meaning of-under s. 3 cl 25 and s. 4 of General Clauses Act Ben Act VIII Of 1885 ss, 144, 184 and 193 sch. III art. 2.

7 C L J 152.

1452.—C P C Ss. 156, 157 and 158 of 1908= S. 3 of 1882—Decree,—Meaning of.

The effect of the proviso to s. [illegible] of the Civil Procedure Code of 1877 taken in connection with the definition of the word ' decree ' in s. 2 is that in all suits pending when that Code came into force, the practice and procedure to be followed down to the final result of such suit [*i.e*: when nothing remains to be done but to execute the decree or appeal from it] are the same as previously existed but that in all subsequent proceedings in execution of the decree or in appeal from it, the practice and procedure provided by the Civil Procedure Code of 1877 are to be observed. The word decree in s. 3 of the Civil Procedure Code 1877 means an order final in its nature and does not include an interlocutory order such as an order of reference to take accounts, although such order may in general, be properly termed "a decree" and therefore a suit which has been referred by the Court to Commissioner to take accounts is still in a stage "prior to decree" within the meaning of s. 3 of the Civil Procedure Code of 1877,

Rustomji Burjorji v. Kesowji Naik.

8 Bom 161.

1453 C P C Ss.156, 157 and 158 of 1908=S. 3 of 1882—Effect of change of law on proceedings already commenced—Attachment—Enforcement of decree—Political pension.

On the 28th of September 1877—i e three days before the new Code of CivilProcedure (Act X of 1877) came into operation—an application was made for the enforcement of a money decree by attachment (inter alia) of a political pension enjoyed by the defendants. Under s. 216 of the former Code (Act VIII of 1859), a notice was issued on the same day to the defendants, calling upon them to show cause why the decree should not be executed. The defendants accordingly appeared on the day fixed at which date the new Code had come into force and contended that under s 266 cl 9 of the new Code the pension was no longer attachable. *Held* that all proceedings commenced and pending when Act X of 1877 became law were, under the General Clauses Act (1 of 1868) s 6 to be governed by the Code theretofore in force the general rule of construction contained in that section not being affected or varied by ss. 1 and 3 of Act X of 1877; and that a *bona fide* application for enforcement of a decree in a particular way coupled with an order of the Court in furtherance of that object as much constitutes a proceeding in execution commenced and pending as the actual issue of a warrant of attachment.

Vidyaranya v Chandrashekharram

4 Bom 163.

1454—C P C Ss. 156, 157, 158 of 1908= S.3 of 1882—Appeal—Suit brought under Act VIII of 1859—Act X of 1877, Sections 556, 558, and 588 (v).—

A suit was instituted in September 1877, when Act VIII of 1859 was in operation, and a decree was passed on the 2nd February 1878 after the repeal of that Act. An appeal was preferred but on coming on for hearing was dismissed for default, on the 31st May, neither the appellants nor their pleader having appeared. On the 21st June, the appellants applied under section 558 of Act X of 1877, to have the appeal restored, on the ground that the pleader whom they had engaged was a lunatic and that having engaged a pleader they had not thought it necessary to appear in person. The Judge rejected the application, and the applicants now appealed against the order rejecting this application. *Held*, that the order of the 1st of June was made under Act X of 1877, and was therefore open to appeal under section 588 (*r*) of that Act. (2 C L R 391, and 2 C L R 208 cited and distinguished.)

Elahi Buksh v. Morachow, **4 Cal 825 = 3 C L R 593.**

1455—C P C Ss. 156, 157 and 158 of 1908 = **S. 3 of 1882—Effect of repeal of Civil Procedure Code, 1877—**Proceedings commenced before re**peal.—**

Cl. **3** of s. 3 of the Civil Procedure Code (XIV of 1882) provides that nothing in that Code shall apply to any proceedings after decree that had been commenced and were still pending on the 1st June 1882. In case of any question connected with proceedings commenced prior to that date, the applicability of the Code of 1882 depends on whether the new proceeding subsequent to that date, out of which the question has immediately arisen, is so intimately connected with the proceedings prior to that date as to be regarded as part of them. A decree was passed in 1870 by which the suit was referred to the Commissioner to take accounts. On the 21st June 1882, the Commissioner, in the course of taking the said accounts, issued [illegible] warrant ordering the defendants to show cause why they should not give inspection of certain books. *Held*, that the question as to inspection was so intimately connected with the taking of the accounts that it should be regarded as part of the same proceedings, and as these had commenced and were still pending on the 1st June 1882, the question whether the order refusing inspection was appealable or not was (under s. 3 of Act XIV of 1882) to be determined by the Civil Procedure Code (Act VIII) of 1859, and not by the Code of 1882.

Rustomji Burjorji v. Kessowji Naik, [illegible] Bom 287.

Notes:—Ref: 16 Cal 267 F B.

C P C (1908) S. 157=(1882 S 3

See Cases under:—

(1) C P C (1908) S. 156.
(2) Appeal — Right of appeal, effect of repeal on.
(3) Execution of decree-Effect of change of law pending execution.

—S. 157.

See Cases under:—

C P C (1908) S. 154.

C P C (1908) S. 158=(1882 S. 3).

See Cases under:—

(1) Appeal—Right of appeal, effect of repeal on.
(2) C P C [1908] Ss. 156, 157.
(3) Execution of decree-Effect of change of law pending execution.

C P C [1908] S. 158—Execution—Fraudulent-decree—Separate suit or application.—**See C** P C [1908] S. 47, Case No. [595]. **7 Ind Cas 11.**

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C P C O. 1 r. 1 S 26 of 1882

Notes—This rule corresponds to s. 26 of the C P Code of 1882, with some important additions and alterations. It has been borrowed from English Order XVI, rule 1. The language of the present rule is wider than that of s. 26 of the old Code. By the substitution of the words "*in respect of or arising out of the same act or transaction or series of acts or transactions*" for the words "*in respect of the same cause of action*" which occurred in the old section, the scope of the present rule has become wider. S. 26 expressly provided that in the case of joinder of the plaintiffs, the relief must be "in respect of the same cause of action". But those words of section 26 have been replaced by the words "*in respect of or arising out of the same act or transaction or series of acts or transactions;*" and the words "*where, if such persons brought separate suits, any common question of law or fact would arise*" have been added in order to enlarge the scope of the present rule.

C P C 1908 O 1 rr 1, 4 (a)-1882 S. 26

See Misjoinder.

C P C (1908) O 1 r 1=(1882 S 26)-*Contd*

See also cases under:—

Parties

C P C O 1 rr 1, 4 (a)=S. 26 (1882)

See also (1) Right of suit—Interest to support right.

(2) Multifariousness

(3) C P C (1908) O 1 r 3. Case No. 1474 **31 Mad 252.**

1456—C P C O 1 rr 1.4 (a)=(1882 S. 26)--Joinder of plaintiffs—Same cause of action.

Where the right of a person to sue as adopted son of the deceased is disputed, the widow and her alleged adopted son can join as plaintiffs in a suit to recover a debt due to the deceased husband and adoptive father; (16 Bom 119 foll. 6 Mad 239 explained.) **Pinapati Mrutyunjaya v Penapati Janakamma. 26 Mad 647 F B.**

1457—C P C O I rr 1, 4 (a)=1882 S 26–Joinder of plaintiffs—Alternative relief.

A suit for possession of a deceased co-parcener's estate in favour of all the plaintiffs on the ground of survivorship or in the alternative for a decree in favour of one of them if he be proved to have been adopted to the deceased is not bad. (26 Mad 627 ref to.) **Lakshmakka v Nagi Reddi 28 Mad 500.**

1458—C P C O 1 rr 1, 4 a=S. 26—Ejectment suit—Misjoinder of Parties—Plaintiffs owners of distinct portions or disputed property.—S. 31.

When in an ejectment suit it was found that the plaintiffs were the separate owners of distinct portions of the disputed property, *held* that they could not sue together and the plaint should be dismissed without going into the question of the defendant's title. **Aba v Limbaji. 1893 P J 122.**

1459.—C P C O. rr 1, 4 (a) O 1 r 9=(1882 Ss 26, 32)-Misjoinder of causes of action—"Cause of action" meaning of.—

The qualification implied in the words "in respect of the same cause of action" in S 26 *C P C* would be satisfied, if the facts which constituted the infringement of right of the several plaintiffs were the same

C P C (1908) O I rr 1,4=(1882,S.26)-*Contd*

Where a suit for recovery of possession was brought by four plaintiffs jointly and it was stated that plaintiff No. 4 had purchased a ten anna share of the properties from the other three plaintiffs.

Held, that the suit was not bad for misjoinder of causes of action. **Sundar Jha v Bansman Jha. 10 C W N 508=33 Cal 367.**

1460.—C P C O 1 r 1, 4 (a)=(1882 S 28)—Misjoinder of parties——Misjoinder of causes of action—Assault—Suit for damages.

Plaintiff's father and son went to the house of defendants, two brothers. During the interview, in which the second plaintiff was claiming payment of some money, a quarrel took place in the course of which the first defendant struck the first plaintiff with his shoe and the second defendant struck the second plaintiff on the head with his fist. The plaintiff, thereupon, filed a suit against the defendants for damages. The defendants contended that there was a misjoinder of parties and cause of action. The lower Courts disallowed the objection and awarded to plaintiffs Rs. 300 as damages:

Held, (1) that as regards the joinder of defendants, they could rightly be sued together, under S 28 of the Code of Civil Procedure, as it was found that they were acting in concert; but

(2) that the two plaintiffs were not entitled to bring one suit, for evidently they had not the same cause of action, since the infringement of the first plaintiff's right to personal security took place when he was struck and was quite distinct from the infringement of the second plaintiff's right when he received a blow; and

(3) that the case did not come within the terms of S 578 of the Code.

Varajlal v Ramdat 3 Bom L R 878= 26 Bom 259.

Notes:—Dist: 33 Cal 1133=10 C W N 1010=4 C L J 121. Ref: 11 C W N 680; 29 Bom 219; Fol: 34 Cal 662.

1461.—C P C O 1 rr 1, 4 (a) 3, 4 (b) O 6 and 7, O 7, r 11.=(1882 Ss. 26, 28, 32 and 53).

Misjoinder of causes of action and parties—Redemption suit —Mortgagor and his transferee of a portion of the mortgaged property can sue together to redeem it—Rejection of plaint—Revision could be had under Punjab Courts Act (XVIII of 1884), S 70 (a and b.) **Nihal Singh v Chaugatta Singh.** **9 P W R 1906.**

1462.—C P C O 1 rr 1, 4 **(a)** O 6 r 17 O 7 r 11 =(1882—Ss 26 and 53)—Suit for libel—Misjoinder of plaintiffs and causes of action-Cause of action, meaning of—Six plaintiffs in libel suit, if suit, to be dismissed.

Six members of the Police force jointly sued to recover Rs 20,000 for alleged liable by the defendants.

Held, that the suit was bad for misjoinder of plaintiffs and causes of action. (22 Cal 833, L R A C 494 (1895) A C 661, 11 Cal 524, 26 Bom 259, 1 Q B 711. Ref. 2 Q B D 496, Explained and Distinguished).

The Court, however, instead of dismissing the suit, directed the plaintiffs to elect, if so advised, as to which one of them should proceed with the suit and that, after such election, the plaint be amended by striking out the other plaintiff and making other consequential alterations.

S C Aldridge v A S Barrow. 11 C W N 680 =34 Cal 662.

1463-C P C Ss 13, 26 explaination V—"Right to relief claimed in common ".

"Right to any relief claimed " in previous suit essential to bar a claim as *res judicata*. Plaintiff alleged that defendants No.2 to 5 (brothers) were reversioners to the estate of the deceased uncle, M and himself claiming as mortgagee and auction—purchaser of the share of the fifth defendant in the said estate, instituted this suit for partition and recovery of possession of the share from the hands of one S, the first defendant, who denied that the fifth defendant was a reversioner and set up his own title as the adopted son of the said M deceased.

A previous suit had been brought by the then plaintiff (present defendants Nos 2, 3 and 4) as reversioners, along with their brother (present fifth defendant) to the estate of said M, who was the divided brother of their father. The then plaintiff's brother (present fifth defendant) was impleaded as a defendant in the previous suit, on his refusal to join his brothers as a co-plaintiff and he remained *ex parte* in that suit. He, thus figured then as a co-defendant along with the present first defendant, S, from whom it was sought to recover the entire estate of M inclusive of the fifth defendant's share. S had, then set up the plea of adoption now put forward by him and the alleged adoption was declared invalid and that suit finally resulted in a decree in favour of the plaintiffs except as to the share of the present fifth defendant, their brother.

In the present suit, accordingly, plaintiff contended that the first defendant, S, was estopped by the decision in the previous suit from again relying on the above adoption. In second appeal, the question referred for decision to the Full Bench was whether the present claim of S, was *res judicata*. *Held*, the fifth defendant, under whom the plaintiff claims, was not interested in nor did he derive any benefit from, the reliefs sought by the plaintiffs in the previous suit. He could not under that decree, enforce any rights of his own. Further, with reference to the shares of the plaintiffs in that suit it must be said that their brother impleaded by them as a defendant in that suit had no " right to any relief claimed " within the meaning of sec 26 of the Code and could not have been made a co-plaintiff therein. The previous plaintiffs, therefore, could not be held to have "litigated in respect of a right claimed in common " for themselves and their brother, the present plaintiff's vendor and the latter was not a " person interested in such right " within the meaning of explanation V to S 13 of the Code.

The fifth defendant and the plaintiff, his vendee and representative, are not barred by any decision in the previous suit and the first defendant's claim therefore, cannot be held to be barred by *res judicata* under said S 13, explanation V of the Code, (3 M H C R 217; 7 B L *R* Ap 33 and 13 Cal 352, Ref and Fol. 14 Mad 324 ; overruled. 18 Mad 164, Not Fol). **Somasundara Mudali v Kulandaivelu Pillai. 28 Mad 457 =14 M L J 404.**

1464—C P C O 1 rr I. 4=S 26 of 1882

Plaintiff sued to set aside the adoption of one V. The District Judge rejected the claim holding that the plaintiff had no right to dispute the validity of the adoption unless he could show that if he succeeded he would have a right to step in V's place, and that the question was [illegible] to the prior right to recognition as representative vatandar. *Held* that the Judge was wrong, and that the plaintiff as one of the owners of the vatan was entitled to deny the validity of the adoption. **Eknath [illegible] Wasudev. 1896 P J 582.**

1465—C P C O I rr I, 4 (a)=S 26—Joint plaintiffs cannot have their rights determined *inter se.*—

Held, that the plaintiffs having jointly brought this suit against the defendant for possession of certain property it was not open to the plaintiff No. 1 who was respondent in the Court of Appeal to raise objections against his correspondent, plaintiff No. 2 and claim that he alone was entitled to the property. **Ambelal v Bapubhai 1896 P J 742.**

C P C O 1 r 2.

1466—C P C O 1 rr 3, 5, 10, O 2 r 3—Suit in name of Corporation—Consent—Nature—All defendants interested in cause of action but not equally—Misjoinder. **46 P R 1911.**

C P C O 1 r 3, of 1908=1882 s. 28

This rule corresponds to section 28 of the C P Code of 1882 with some additions and alterations. The rule has been amplified by following the wording of English Or. XVI r 4.

"The Committee realize that the words "in respect of the [illegible] matter" in rule [illegible] have given rise to great difficulty, and they think it advisable to follow the wording of the English rule and to omit them." *See the Report of the Special Committee.*

By the omission of the words "in respect of the same matter" which occurred in the old section 28 and by following the wording of the English Order XVI rule 4, the scope of the present rule has been made wider than the provisions of section [illegible] of the C P Code of 1882. The object

of this rule seems to be to avoid multiplicity of suit if it could be done without embarrassment to any of the defendants. The general principle governing the joinder of defendants would [illegible] to be that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary and that separate causes of action against separate defendants though quite unconnected but at the same time involving any common question of law or fact, may be joined in one action under the present rule.

The words "in respect of the [illegible] matter" in section 28 of the old Code, have been replaced by the words "*in respect of or arising out of the same act or transaction or series of acts and transactions*" and the words "*where if separate suits were brought against such persons any common question of law or fact would arise*" have been added in order to enlarge the scope of the present rule.

See Cases under

(1) **Multifariousness.**
(2) parties.
(3) Misjoinder. **(1904) 18 M L J 484.**
[illegible] P R 1896.

1467-1468—C P C O 1, r 3, O 2, rr 3, 6=(S. 28, 45).

Multifariousness—Suit by co-owner for share of rent impleading other co-owners and claiming relief from them in the alternative not multifarious. **19 M L J 399.**

1469-C P C O 1, rr 3, 4, O 2, rr 3, 6=(1882 Ss. 28, 45)—Possession of land, suit for causes of action, joinder of—Parties, joinder of.

Where a purchaser of lands, from Defendant No. 2 being dispossessed by Defendant No. 1 who also claimed by purchase from Defendant No. [illegible] sued Defendent No 1 for possession and an alternative claim for refund of purchase money against Defendent No 2, *Held*, that there was only one cause of action viz. dispossession of plaintiff from the land.

Held, also—That Defendant No. [illegible] was [illegible] necessary party to suit. (19 Cal 123,8 Cal 963 fol. 23 Cal 821 Dist:) **Serajul Huq Khan v. Dinabundhu Sen. 6 C W N 300=29 Cal 257.**

Notes:—Dist 6 C W N 585. Ref. 31 Mad 252 =18 M L J 238.

1470-1471 —C P C O 1, rr 3, 4 (b)=1882 S. 28)—Misjoinder of parties—Suit for possession of lands—Possession with many defendants from the same alienor—Lands in different villages—One trial if venue for trial is the same—Trial of issues—Interlocutory judgments on issues—Practice—English practice followed.

It is competent to [illegible] plaintiff to join, in one suit for possession of land, alienees of different portions of the same estate claiming under the [illegible] alienor. Even where the lands are situated in several different villages, provided the *venue* of the trial is the same, the right of plaintiff to have his claim tried in one suit is the same as if the different holdings were all in the same village. No objection can be taken to the suit on the ground of misjoinder of parties under S. 28 C P C 1882 (11 Mad 106; 24 Cal 831; 29 All 267 foll. 7 Bom 280 Dist).

In cases like these, any difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice, interlocutory judgments may, if the plaintiff succeeds, be given against different defendants [illegible] their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case. **Umbai Mangesharo v. Vithal Vasudeo Shetti.**

11 Bom L [illegible] 34=33 Bom 293=5 M L T 230 =1 Ind Cas 120.

1472—C P C O 1, rr 3, 4 (b)=(1882 S. 28).—Misjoinder of parties and causes of action—Relief asked common to, the defendants joined—Practice.

The plaintiff owned [illegible] godown in Bombay. He agreed with Messrs. Khimji Vishram (defendants Nos. 1-6) to let the godown from 1st May 1906 for [illegible] fixed term of 12 months. At the date of the agreement, the godown was in the occupation of Messrs. Nensy Khairaz & Co. (defendants Nos. 7, 8). The plaintiff sued the two sets of defendants to recover from either the one or the other set a sum of money for rent of his godown. Messrs. Khimji Vishram alleged that they did not get possession of the premises in terms of the agreement, that they obtained possession of only one compartment out of three on the 22nd May 1906, in consequence of which they had to hire other premises. The second set of defendants, Messers. Nensy Khairaz & Co contended that there was an oral agreement with the plaintiff that they should occupy the godown till the end of May 1906, that they gave up possession of a portion of the godown before the 22nd May 1906, they gave up the possession of the remaining portion to the plaintiff and the first set of defendants. (Messr's Khimji Vishram & Co). It was objected to this suit that it was bad by reason of misjoinder of parties and causes of action.

Held, disallowing the objection, that the subject matter in respect of which the plaintiff sought relief against both sets of defendants was rent of his godown. It was the same matter as regards both sets of defendants and both sets of defendants were interested in the adjudication of questions involved in the suit and there were many questions of fact which were common to the case of both sets of defendants.

The object of S. 28 of the Civil Procedure Code is to avoid multiplicity of suits if it could be done without embarrassment to any of the defendants.

The general principle governing the joinder of defendants would seem to be that there must be a cause of action in which all the defendants are *more* or *less* interested although the relief asked against them may vary but that separate defendants quite unconnected and not involving any common question of law or fact cannot safely be joined in one action. **Mavji v. Kuverji** **9 Bom L R 482=31 Bom 516.**

Notes:—Ref 11 Bom L R 499; 18 M L J 238; 31 Mad 252.

1473.—C P C O.1 rr 3, 4 (b)=1882 S. 28—'Same matter'-Misjoinder of parties-Suit by creditor against agent and debtor in the alternative.

A suit by the creditor for recovery of money lent from the debtor and in the alternative, from his (the plaintiff's) agent, who alleged that he had lent the amount to the debtor, is not bad for misjoinder of parties (27 Mad 80 Dist).

Meyappa Chetty v. Perianan Chetty. **16 M L J 39=29 Mad 50.**

1474.—C P C O I rr 3, 4 (b) = (1882 Ss.23, 26)-Misjoinder of parties defendants-"In respect of the same matter"-Suit by assignor of mortgage against mortgagor and his own assignee for a mortgage-decree against the mortgagor and in the alternative a personal decree against the assignee-Mortgage, transfer of—

Per Benson and Wallis JJ.—Chief Justice dissentiente. A Suit by the assignee of a mortgage against the mortgagor and his assignor the mortgagee for a mortgage-decree in the first instance against the mortgagor for the whole amount mentioned in the mortgage and in the alternative, for a money-decree against the assignor [mortgagee] in respect of the amount that may be proved to have been received by him subsequent to the assignment and a mortgage-decree in respect of the balance is not bad for misjoinder of defendants.

Per Wallis J.—The words " in respect of the same matter " in S. 28 indicate that claims to relief might be joined in one suit against several defendants whether they constituted separate causes of action or not so long as they are in respect of the same matter. The scope of S. 28 is wider than that of English rule 4, O XVI, and English decisions under rule 4 are not applicable to S. 28 C P C.

Obitter—English decisions on rule 1, O. XVI are applicable to cases of joinder of plaintiff under S. 26 C. P. C. (25 Mad 736, 27 Mad 80.

29 Mad 50, 8 Cal 170, 8 Cal 963, 13 Cal 555, 31 Bom 516 Ref).

Aiyathuria Ravatnon v. Meera Ravuthan **18 M L J 238=31 Mad 252.**

1475—C P C. O 1, rr 3, 4 (b)=(1882 S. 28)—"In respect of the same matter"—Order XVI rule 4.

Rule 4 of order XVI which corresponds with S. 28 C P C is wider than the section. *Semble.*—Two separate causes of action cannot be joined against two defendants in one suit. The right to relief against an agent for an alleged breach of contract and that against a partner of the same firm to have accounts taken and the partnership wound up, cannot be said to be in respect of same matter." (1896.) I A C 430; 86 Ch. Dist 35; L R 1899. 2 Ch D. 696; 223 referred to.

Muthappa Chetty v. Muthu Palani Chetty. **27 Mad 80.**

Notes;—Dist: 29 Mad 50=16 M L J 39, Not Fol: 31 Mad 252=18 M L J 238.

1476—C P C O I rr 3, 4 (b)=(1882 s.28)-Suit as heir of a deceased person for possession of deceased's property from several defendants—Defendants claiming under different persons—No concert among the defendants-Alleged misjoinder.

Where the plaintiff claimed the ownership of the properties in suit through her late husband and alleged that her rights had been infringed at different times and by different sets of defendants, and it was found that the latter did not act in concert and did not combine together to dispossess the plaintiff:—*Held*, that there were separate causes of action against seperate sets of persons, and the trial could not proceed upon a single cause of action. **Ram Prosad v S M Sachi Dassi.** **6 C W N 585.**

Notes—Ref: 8 C L J 196.

1477—C P C O 1, rr 3, 4 (a)=(1882 S 28)—Misjoinder of parties—Misjoinder of causes of action—Assault—Suit for damages.

Plaintiff's father and son, went to the house of defendants, two brothers. During the interview, in which the second plaintiff was claiming payment of some money, a quarrel took place in the

C P C(1908 0.1 r 3=(1882 S.28)-*Concld.*

course of which the first defendant struck the first plaintiff with his shoe and the second defendant struck the second plaintiff on the head with his fist. The plaintiffs, thereupon, filed a suit against the defendants, for damages. The defendants contended that there was a misjoinder of parties and causes of action. The lower Courts disallowed the objection and awarded to plaintiffs Rs. 300 as damages:

Held, (1) that as regards the joinder of defendants, they could rightly be sued together, under S. 28 of the Code of Civil Procedure, as it was found that they were acting in concert; but,

(2) that the two plaintiffs were not entitled to bring one suit, for evidently they had not the same cause of action, since the infringment of the first plaintiff's right to personal security took place when he was struck and was quite distinct from the infringement of the second plaintiff's right when he received a blow: and (3) that the case did not come within the terms of S, 578 of the Code.

Varajlal v. Ramdat 3 Bom L R 878=26 Bom 259.

Notes:—Dist: 33 Cal 1133=10 C W N 1010 =4 C L J 121. Ref: 11 C W N 680; 29 Bom 219: Fol 34 Cal 662.

—C P C O 1 r 3—See C P C (1908) O 1 r 1 Case No. (1461). **9 P W. R 1908.**

—O 1 r 3—To appoint a trustee and to recover trust properties—Joinder of parties.—**See** C P C (1908) S 92 Case No. (1142). **4 L B R 183.**

—O 1 r 3—See C P C O 2 r 3. Case No (1565) **29 Cal 257.**

C. P. C. O. 1 r. 4=1882, Ss. 26, 28.

Notes:—This rule corresponds with the latter parts of ss. 26, 28 of the C P C 1882, and follows English order XVI rr 1 and 4.

C P C-**O 1 r 4.**-Attachment before judgment-Defendant called upon to show cause or furnish security. **See**—C P C O 38 r 6. Case No 2919 **20 M L J 980.**

—O 1 r 4-See-C P C O 2 r 3. Case No (1565) **29 Cal 257.**

C P C(1908) 0.1 r 4=(1882, Ss. 26, 28)-*Concld.*

—O 1 r 4— To appoint a trustee and to recover trust properties-Joinder of parties. **See** C P C (1908) S 92. Case No (1142). **4 L B R 183.**

—O 1 r 4 Cl (a)

See—also cases under:—

(1) C P C (1908) O 1 r 1.

(2) C P C (1908) O 1 r 3. Case No (1474). **31 [illegible] 252.**

—O 1 r 4 B-

See (1) C P C O 1 r 1, Case No (1460) **26 Bom 259.**

(2) C P C (1908) O 1 r 1, Case No (1461) **9 P W R 1908.**

(3) C P C O 1, r. 4 (b)

C P C 1908 or. 1 r 5.

Notes—This is new. It follows English Order 16, r 5.

C P C 1908 O 1 r 6=1882 S. 29

See Cases under:—Parties.

C P C 1908 O. 1. r 7.

Notes—This rule is new. It follows the English order 16 r 7.

C P C O 1 r. 8=S. 30, 32 of 1882

Notes—This rule corresponds with section 30 of the C P Code, 1882. The only change made in sub-rule (1) is the substitution of the word "*persons*" for the word "*parties*" which contained in the old section. Sub-rule 2 corresponds with para 4 of section 32 of the old Code with the addition of the words "*or for whose benefit.*"

" We have, on the suggestion of the Advocate General of Madras, added the words, "or for the benefit of " after the words "on behalf of." *See the Report of the Select Committee.*

See Cases under:—

Parties.

— **O 1 r 8**—Procedure in case of death of one of several plaintiffs or of sole plaintiff.—**See C P**

O. O 23 r 3 Case No 2741. **27 Bom 162.**

1478—O I r 8 [1]=[S 30]—Applicability—Leave when necessary.

Semble: The first part of S 30 should be read [redacted] implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same. (5 All 602 ref to). **Maharaj Bahadur Singh v Paresh Nath Singh. 31 Cal 839 at 845.**

C P C 1908-O I r. 8. See O P C 1908, S 2 cl. 11. Case No 47 **11 M L T 257.**

1479—C P C O 1 r. 8=1882 S. 30-Leave given after commencement of action-Previous refusal-Validity of suit:—

Leave to sue under S. 30 of the Code need not necessarily precede the commencement of the suit, but may be given after it has begun. Where leave has been so given, it is immaterial that an application for permission to sue has been previously refused. (23 Mad 28 ref. to. 21 Bom 784 and 22 All [redacted] foll). **Chennu Menon v Krishnan 25 Mad 399.**

1480-C P C [1908] O 1 r 8 [1]—Muhammadan Law-Religious endowment—Place used [redacted] cemetery—Form of suit--Permission of Court under—Right of suit—Trusts, suits relating to, **A W N 1885, 219.**

1481—C P C O I r 8 [1]=[1882 S, 30]—No formal order made—Permission:—

'A suit under S 30, C P C, by one [redacted] behalf of a class is not vitiated by the fact that the order granting permission was not duly recorded in the order sheet, if in fact permission was granted and the other formalities were duly complied with (21 Cal 180, foll). **Kalu v Jan Meah, 29 Cal 100**

Notes—Ref: 33 Cal 905=10 C W N 867. Dist 11 C W N 85=4 C L J 370.

1482--C P C O I r 8 [1]=[1882 S. 30]—Dismissal of suit—Non-service of notice-Non-publication of advertisement.

The suit was dismissed on the ground that the notice required to be served under S. 30 C P C was not served, nor was any advertisement published; but the plaintiff applied, in his plaint permission, and the defendant in his written statement mentioned the names of the other persons interested in the plaint property.

Held, as the plaintiff asked for permission in the plaint, even though there was no express order granting it, the presumption was that it had been granted, inasmuch [redacted] the plaint was admitted and registered.

It is the duty of the Court to cause service of notices or the publication of advertisement.

The plaintiff's suit should not have been dismissed for the failure of the Court to perform the duties imposed upon it by the section.

Makh Lal Singh v Jagdeo Tewari. 35 Cal 1021.

1483--C P C O I. r. 8-Will-Executor-Legatee-Suit-Administration suit.

The plaintiff, [redacted] legatee under a will, brought a suit, against the executors of the will, to recover the sum bequeathed to him by the testator. The Court of first instance awarded his claim. The lower appellate Court, [redacted] of opinion that the plaintiff should have brought an administration suit, making the other legatees under the will parties to it. The Court asked the plaintiff to amend the plaint and to add all the legatees as parties. This the plaintiff declined to do, at which the Court dismissed his suit as one not properly framed. On appeal to the High Court,

Held, that the lower appellate Court [redacted] in error in holding that the plaintiff was not entitled to sue the executors for the legacy bequeathed to him. **Purshotam v Kala. [redacted] Bom L R 932=26 Bom 301.**

Notes—Ref 9 Bom L R 404.

1484- C P C O 1 r 8 (1) ss. 92 and 93=(1882 Ss.30, 539)-Public religious trust—Right of members of a sect to worship—Infringement—Right of suit—Special damage—Representative suit by some members—Notice on others, how served—Advertisement—S. 30—Civ Pro Code, application of—Parties.

The plaintiffs, who were members of the Satchasi community in their village, purported to bring this suit under S. 30, on behalf of themselves and other members of that community for [illegible] declaration of their right to take part in the management of the worship of a goddess and for joint possession with the defendants of the land [illegible] which the worship was carried on. Notice of the suit was personally served on certain important members of the caste known to the plaintiffs and by advertisement in newspaper on others.

Held—That the suit was properly instituted under S. 30, and the formalities prescribed by that section were sufficiently complied with. *Per Rampini*, J—S. 539, Civ Pro Code, did not apply as the suit was not instituted on behalf of the general public, the members of the *Satchasi* community being a small and easily determinable body.

Per Woodroffe, J—This [illegible] a case of public religious trust, though not a trust for the public [illegible] large, but only for a portion answering [illegible] particular description.

S. 30, Civ Pro Code deals with procedure only and does not affect substantive rights of suit.

Where the right to [illegible] exists, it is open in [illegible] of this nature for two persons to sue with permission under s. 539 or for one or more to sue on behalf of the rest with permission under S. 30 or for all interested to join in suing.

In the case of [illegible] infringement of [illegible] right of the general public, no suit can be brought under [illegible] 30 or at all, unless on proof of special damage in which case either one person [illegible] in respect of the infringement of his individual right, and the section does not apply, or if he should sue on behalf of others, similarly specially injured, he sues on their behalf and not on behalf of the general public.

S. 30 should not, in its application, be limited to cases where the parties though numerous can be definitely ascertained. A suit may be instituted under this section, on behalf of [illegible] defined class of the general public though that class may, [illegible] in this case, be composed of [illegible] more or less *indefinite* number of persons. (7 All 183 Ref. 10 C W N 581, Ref. [illegible] Mad 463, Appr: 20 Cal 397, Dist and disapproved.) **Monmotha Nath Das v Harish Chandra Das.** **10 C W N 867= 33 Cal 905.**

1485—1486—C P C O 1 r 8—Practice—Parties to a suit—All interested persons—Representative order.

It is a general rule that all persons interested ought to be made parties to [illegible] suit however numerous they may be so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigation may be prevented. This rule no doubt yields to the exigencies of particular [illegible] and there [illegible] well established qualifications of it: one of them [illegible] power of the Court under S. 30 of the Civil Procedure Code to make [illegible] representative order. **Sursangji v Partapsang.** **5 Bom L R 937=28 Bom 209.**

1487—C P C O 1, r 8=S. 30 of 1882.

Representative suit by riparian owners—Division by Government for non-riparian purposes—Damage necessary—Cause of action distinct. **[illegible] L T 149=19 M L J 131=32 Mad 141= 2 Ind Cas 325.**

1488 -1489—C P C (1908) O 1 r 8 (1).

Claim of private right by plaintiff over land—Claim of public right by defendants—Parties—Irregularity in not recording formal order-Effect—Specific Relief Act, 1877, s. 42. **[illegible] Ind Cas 46.**

See also Cases under:—

(1) Suits by some of [illegible] Class [illegible] Representatives of Class

(2) Right of Suit—Charities and Trusts.

(3) Appeal orders Cases Nos (800, 802). **13 Cal 100, 12 Mad 489.**

(4) Limitation Act 1877 s. 22.

(5) Parties—Adding parties to suits.

(6) Debtor and Creditor, **26 Bom 577.**

(7) Hindu Law—Joint Family.
(8) Common land

C P C O. 1 r. 8 (2)=S. 32. 1882

Persons for whose benefit suit is instituted or defended may apply to be made a party.

1490-1491—C P C O 1 rr 8 (2) 10, cl 2 (=S. 32 C P C 1882)-Partition suit—Separated members-Whether necessary parties—Construction of S 32.

Held, that it is a general rule, a rule upon which S. 32 of the old Code 1882 and, O 1, r 10 of the new Code 1908 is founded, that all persons interested ought to be made parties, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all per[illegible] interested and that there are some special features in a partition suit, which make it obligatory that all persons, interested in it and likely to be affected by it, should appear in the case either [illegible] plaintiffs or defendants. S. 32 is to be construed widely.

The expression "all questions involved in the suit" found in O 1 r 10 cl 2 C P C 1908 (=S. 32 of the old Code), would in a partition suit include not only the question arising out of the plaint, but of the plaint considered along with the statement of the defence. (1889) 58 L J Q B 410 (411) (1896) 65 L J Q B. 18 (20) Ref. **Amrut v Mukund. 5 N L R 152**

1492-1500—C P C O *1* rr *8* (2), 11 =(*1882*) s. 32 -Civil Procedure Code 1882 s.32- Parties joinder of —Application to add party—Limitation for—Limitation regarding suit as to added party—Dismissal of mortgage suit against—added defendant as barred by Limitation—Effect of, on other defendants.

Held by the Full Bench—That [illegible] court, in joining parties under section 32 of the Civil Procedure Code is untramelled by any question of limitation in respect of an application for such joinder, but the joinder cannot be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder. When a party defendant has been adde to a suit either upon the

application of the plaintiff or by the court of its own motion, it is competent to him to take objection that as against him the suit is barred by limitation, and if such objection is well founded it must prevail and the suit [illegible] against him must be dismissed. (3 C L J 576: Appr; 24 Cal 640; 27 Cal 540 Over; 12 Cal 642 Expl).

When a person has been added as [illegible] defendant in a mortgage suit upon the allegation that he is interested in the equity of redemption, but no investigation had been made as to the extent, if any, of his interest; if the suit is dismissed against him on the ground that it is barred by limitation, the decree as against the others will stand; no question of the distribution of the mortgage debt could be decided as there are no materials.

Ram Kinkar Biswas v Akhil Chandra Chowdhury. 2 M L T 137 (F B)= 11 C W N 350=5 C L J 242=35 Cal 519.

Notes—Ref: 35 Cal 1065=8 C L J 286; 13 C W N 186; 7 C L J 251; 36 Cal 675=9 C L J 523; 10 C L J 496; 4 A L J 194.

1501—C P C O. I, rr 8 [2], 10 [2]=[1882 S. 32]—Misjoinder of parties.

Plaintiffs 1 and 2 brought a suit as the daughter and adopted son respectively of N, to recover possession of N's property from the defendants. The plaint alleged that both were owners of the property and sought a declaration of the ownership of the plaintiffs as against the defendants; but it contained no allegation asking for relief in favour of plaintiff 1, in the event of plaintiff 2's adoption being found not proved.

Held, that suit was not bad for misjoinder since plaintiff 1 beyond alleging in the plaint that she was N's daughter did not set up her right to recover the property as his daughter, but claimed it with plaintiff 2 on the ground that the latter was N's son and that she lived with him. **Ningawa v. Ramappa, 5 Bom L R 708= 28 Bom 94.**

Notes:—Ref: 31 Bom 80; 8 Bom L R 897, Dist: 9 Bom L R 1054; 32 Bom 7.

C P C (1908) O 1 r 8=(1882, Ss. 30 32)—*Concld.*

See also Cases under:—

(1) Parties—Parties to suit—Striking off parties.

(2) Specific Relief Act 1877 S 9
(1886) A W N 138.

(3) Limitation Act (1908) Ss. 4, 5,
22 A W N (1888), 58.

(4) Appeal—Orders. Cases Nos.(800,802).
13 Cal 100=12 Mad 489.

—C P C (1908) O. 1 rr 8 (2), 10 (2), (3), (5), 11—Addition of receiver a party.—See Receiver.
14 C W N 653=6 Ind Cas 24.

—C P C (1908) O. 1 rr 8 (2), 10 (2), (3), (5), 11—Special or second appeal. **3 M L J 223.**

—C P C (1908) O. 1 rr 8 (2) 10 (2), (3), (5), 11—**See** Insurance. **3 S L R 191=4 Ind Cas 1160.**

—C P C (1908) O. 1 rr 8 (2), 10 (2), (3), (5), 11—**See** Joinder of parties. **118 P R 1890.**

—O. 1 r. 8 cl. [2]—See C P C (1908) O. 1 r 1, Case No. (1461). **9 P W R 1908.**

—O. 1 r. 8 cl. (2)—See C P C (1908) O. 1 r 9, Case No. (1504). **28 Bom 94.**

—O. 1 r. 8 cl. (2)—Whether a fresh defendant can be substituted for a sole defendant against whom no cause of action is found to exist—Notice under S. 424 (1882) is necessary in case.

See C P C (1908) S. 80, Case No. (1095).
59 P W R 1908.

C P C O. 1 r. 9=S. 31 of 1882.

Notes:—This rule corresponds with section 31 of the C P Code, 1882. The words "*or non-joinder of parties*" have been added, and the second para of section 31 of the old Code has been omitted. It follows the English Order XVI. r. 11, and the principle laid down in 21 Mad 373.

C P C (1908) O 1 r 9= (1882. S. 31) —*Contd.*

—O. I, r. 9 of 1908=(1882) S. 31.

See Cases under:—

(1) Misjoinder.
(2) Multifariousness.
(3) Parties.

—C P C O. I, r. 9-See Power of Court Act VIII of 1876 (Bengal Estates Partition).
13 Ind Cas 123.

—C P C O. I, r. 9—See Misjoinder of parties—Suit not liable to be dismissed.
12 Ind Cas 206.

1502—C P C O. I, r 9=S. 31 (1882)—Parties, non-joinder of — Suit not liable to be dismissed.

If no issue framed and plaintiff not allowed an opportunity to adduce evidence on the point of non-joinder although the objection was taken by the defendant in the first Court.

Umri Mal v. Jai Gopal, 217 P L R 1910.

1503—C P C O. I, r. 9—Suit for land awarded at partition of whole culturable land of village—Parties—Duty of Appellate Court.—

The plaintiff sued eleven defendants for possession of a small corner of *gorah* land which had been awarded to him at a partition of the whole culturable land of the village.

The Court of first instance impleaded the whole proprietary body as co-defendants.

In his appeal to the Divisional Court, the plaintiff again made the eleven original defendants respondents.

The Divisional Judge rejected the appeal on the ground (*inter alia*) that the whole of the proprietary body had not been made respondents.

Held, that the Divisional Judge was not justified in rejecting the appeal for want of parties, there being no reason why the principle of Section 31, Civil Procedure Code, should not be applied, so far as may be, by Appellate Courts. Two courses were open to the Court:

(1) to decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court; or

C P C (1908) O 1 r 9=(1882, S. 31)-
Contd.

(2) to have used the power given it by Section 559, Civil Procedure Code, if the Court considered it necessary, and to have directed that the other defendants be made respondents.

Held, also that the suit (which was instituted while the Punjab Land Revenue Act, 1871, was in force) was not excluded from the cognizance of the Civil Courts by the provisions of that Act.—**Ali Mir v. Gulab Din, 5 P R 1892.**

1504—C P C O. I, r.9; O 2 rr. 4, 5=(1882 Ss. 31, 44)—Misjoinder of defendants or causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferees from such other heir.

A plaintiff came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held*, that there was no misjoinder of parties or of causes of action in such a suit. (11 All 33 fol.). With reference to the objection that the claim included both moveable and immoveable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was held that s. 44 of the Code of Civil Precedure did not apply to such a case. (10 Mad 375 at p.506 ref.to.)

Mazhar Ali Khan v. Sajjad Husain Khan, 1902 A W N 85=24 All 358.

Notes:—Fol: 4 A L J 121; W N [1907] 36; 29 All 267; 30 All 560 F B=[1908] W N 235; 5 A L J 647 F B.

1505—C P C O 1 r 9. S. [illegible] —Civil Courts—Jurisdiction — Suit against Administrator—General.—

A suit brought against the Administrator-General must be instituted in the District Court: and it makes no difference if the Administrator-General is not a party to the suit in his official capacity, but is sued simply as representing the estate of a private individual.

Antone v. Administrator-General of Bombay, 6 Bom L R 546=28 Bom 529.

1506—C P C O 1 r 9 — **Infringement of—Rights of manufacturer and importer of an article regarding a trade-mark.**

Importers can only protect marks indicating importation by them. If their importation is not indicated by the marks but otherwise, as for instance by the style and name under which they trade as importers, they could not use to restrain the use of the marks, and could only sue if their trade 'name' and style were deceitfully assumed by a rival.

A trade-mark, which represents not the importer's reputation but the manufacturer's, is under the control and protection of the latter, not of the former. **Heiniger v. Droz, 3 Bom L R 1=25 Bom 433.**

—O. I, r. 9—See C P C [1908] O. I, r. 1, Case No. [1459]. **33 Cal 367.**

C P C O.I, r.10=1882 S.27 Ss. 32, 33.

Notes:—Sub-rule (1) corresponds with section 27 of the C P Code, 1882. The changes introduced by this sub-rule are the substitution of the word "*instituted*" for the word "*commenced*" and the omission of the word "*persons*" and of the words "*with his or their consent*".

Sub-rule *(2)* corresponds with paras. 1 and 2 of section 32 of the C P Code of 1882. Material changes have been introduced in this sub-rule as will appear from the comparison of this sub-rule with paras. 1 and 2 of section 32 of the old Code.

Sub-rule [3] corresponds with para. 3 of section 32 of the C P Code of 1882, with some modifications.

Sub-rule [4] corresponds with section 33 of the C. P. Code of 1882, with some modifications.

Sub-rule (5) corresponds with para 5 of section 32 of the C P Code of 1882, with some modifications.

Para 4 of section 32 of the C P Code of 1882 has been reproduced in rule 8 as sub-rule (3).

C P C (1908) O 1 r 10 (1)=(1882) s. 27.

Suit in the name of wrong person-Court may add a substitute.

1507—C P C O 1, r (10)=1882 (S. 27)—"As plaintiff"—Applicability of section to wrong person made defendant.

S. 27, C P C applies only to cases in which a suit has been instituted in the name of a wrong person as plaintiff and not to cases in which a suit had been instituted against a wrong person as defendant. **Basavaraju v Parry & Co. 27 Mad 315 at 326.**

1508—C P C O 1 r 10 (1)—Substitution of name of another person as plaintiff—Application by plaintiff disclaiming interest in subject-matter of suit, for.

The plaintiff brought a suit for pre-emption against the defendant in respect of an under proprietary tenure on the ground that she was the superior-proprietor. During the trial of the suit she presented to the Court an application in which it was stated that she was mistaken in believing she was the superior proprietor, and she prayed that, under the provisions of s. 27 of the Code of Civil Procedure, the name of her son, who was the superior-proprietor, might be substituted for her own in the plaint. Her son did not appear in the case and there was no evidence to show that he consented to the substitution of his name as plaintiff. The Court rejected the application and dismissed the suit. *Held*, that the name of the plaintiff's son could not be substituted for her own under s. 27 Civil Procedure Code, and that her suit was rightly dismissed. **Sheoraj Kuar v Hari Kishan. 3 O C 347.**

1509—C P C O 1 r 10 (1)=(1882 s.27)—Suit by agent in his own name—Dismissal of suit—Right of principle to appeal—Substitution of principal's name as plaintiff—S. 230, Contract Act.

Where a suit was dismissed on the ground that agent could not sue in his own name, it was held, on appeal by the principal.

That, as the suit was commenced in the name

C P C (1908) O 1 r 10=(1882, Ss. 27 32 33)-*Contd.*

of a wrong person through a *bona fide* mistake the principal's name should be substituted for that of the agent under s. 27, C P C on the initiative of the principal, or of the agent or of the Court itself. Case remanded with the substitution of the principal as plaintiff, for determination on the merits. (1 L B R 191 ; 350 Dist: 2 N W P H C 179 ; 21 Bom 205 ; 20 Mad 467; 12 W R 117 Ref.) **A L S P S Soobramonion Chetty v Myat Tha U. 4 L B R 95.**

1510—C P C O 1 r 10 (1)=(1882s.27)—Plaintiff—Addition of, after commencement of suit—Bona fide mistake, institution of suit through.

The original plaintiffs claimed title to the property in suit under a *tamlik-nama* executed in their favour by their father, B The defendant denied that plaintiffs had any title to the property in suit ; he did not plead that the *tamlik-nama* did not cover the property in suit and did not at any time ask for an issue as to the effect of the *tamlik-nama.*

B then presented a petition that he might be added as a plaintiff, and his sons made the same request. Upon the facts of the case the Court held that the suit was commenced as it was through a *bona fine* mistake on the part of the plaintiffs within the meaninig of s. 27 of the Code. *Held*, further, that the case came within s. 27 which allows an addition or substitution of a plaintiff "at any stage of the case," and that B was rightly added as a plaintiff. **Abdul Wahid Khan v Sadiq Ali Khan. 7 O C 193.**

1511—C P C O 1 r 10 (1); O VI r 17 Cl O=(Ss. 27, 53)—Wrong person—Applicability to case of mistake—Amendment of plaint.

S. 27, C P C, is applicable in cases where by *bona fide* mistake of law or fact, actions have been brought in the name of wrong person. (20 Mad 467 ; 6 Ch D 82 ref to.) **Gopal Das Agarwallah v Budree Dass Sureka. 10 C W N 622=33 Cal 657.**

1512—C P C O 1 r 10 (1)=(1882 s. 27).

Where a suit is brought by a plaintiff claiming as sole partner and it is found there are others, the plaintiff is entitled to have the plaint amended (17 Bom 413 fol.). **Vadilal v Khusal. 27 Bom 157=4 Bom L R 968.**

C P C (1908) O 1 r 10=(1882 Ss. 27 32 33-*Contd.*

1513—C P C O 1 r 10 (1)=(1882 S.27)—Suit by plaintiff having no right to sue—Substitution of right person.

The words "if the suit is brought in the name of the wrong person as plaintiff" cannot be construed as excluding altogether persons who may institute the suit without any right to do so.

Where a suit has been instituted in the name of a person who has no right to institute such suit, the Court has power to order that any other person may be substituted as plaintiff, provided it is satisfied that the suit was so commenced through a *bona fide* mistake. **Krishna Boi v The Collector and Government Agent Tanjore. 2 M L T 447=30 Mad 419.**

1514—C P C—O 1 r. 10 (1)=S. 27—Party—Addition and substitution of accounts, suit for—Bona fide mistake—Mistake of fact or in law—Administration, order, for, when relates back—High Court's power of interference-Interlocutory order.

O. 1 r 10, sub r (1) of the Code of Civil Procedure is applicable only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake, but such mistake may be one of fact or of law.

Three of the five heirs of the testator viz A. B and C after the decision by the lower Court ■ to the invalidity of the will in a suit for construction of the will, and during the pendency of an appeal against that decision, instituted ■ suit against the representatives in interest of the executor and the other heirs for accounts. After the suit for construction of the will was withdrawn, owing to adverse decision of the question by a Full Bench, A, and D one of the shebaits under the will, after obtaining letters of administration, applied in the account suit that they be substituted or added as parties and that B and C might either be removed from the suit or transferred to the category of defendants.

Held, that A and D were to be added to and substituted for the parties, and they were entitled to maintain the suit.

Although an act done by ■ party, who afterwards becomes administrator, to the prejudice of the estate, is not made good by subsequent administration yet if the act is for the benefit of the estate the order relates back, so that by virtue of the appointment, the administrator is able to recover against such persons as have interfered with the estate, and thereby to prevent from being prejudiced and deposited.

It is within the powers of High Court to interfere with interlocutory orders, if the Court is satisfied that such interference is needed in the interests of justice. **Charu Chunder Dutt v Sarat Chunder Singh. 12 C L J 537.**

1515—C P C O I r 10 (1) O 22, r 4=(1882 Ss.27 and 368)—Addition or substitution of name as plaintiff in ■ suit brought by one, not entitled to bring it.

A defendant has ■ right to the dismissal of ■ suit brought against him by an unauthorized person and the defect cannot be cured by the addition or substitution of the name of the person who might have brought the suit unless the case comes within s. 27 C P C. **Rani Raghubans Kuar v Hashmat Ali. 7 O C 78.**

-O I r 10 (1) of 1908=1882 S. 27.

See Cases under:—

(1) Limitaton Act, 1877, S 22.
(2) Parties-Adding Parties to Suits-Plaintiffs.

—**O 1 r 10**-Tenant raising title of third Party—Remand by lower appellate Court-Inherent powers.

See C P C (1908) S 151 Case No (1407).
11 Ind Cas 188.

—**O I r 10 (1)—See** C P C O I r 10 (2) Case No: (1525) **33 Mad 115.**

—**O I r 10 (2)—See** also cases under C P C O 1 r 8 (2).

-C P C O 1 r 10 (2).

— O 1 r 10 (2)—Receiver if may be added ■ party by Court *suo motu* **See**–Practice Parties. **14 C W N 654.**

C P C (1908) 0 1 r 10=(1882, S. 27 32 33)-*Contd.*

1516-1517—C P O O I rr 10 (2), [illegible] (3) (5) 8 ol (2) 11—Misjoindr of parties.

Plaintiffs 1 and [illegible] brought [illegible] suit as the daughter and adopted son respectively of N, to recover possession of N's property from the defendants. The plaint alleged that both were owners of the property and sought [illegible] declaration of the ownership of the plaintiffs [illegible] against the defendants: but it contained no allegation asking for relief in favour of plaintiff l, in the evnt of plaintiff 2's adoption being found not proved.

Held, that suit was not bad for misjoinder since plaintiff 1 beyond alleging in the plaint that she was N's daughter did not set up her right to recover the property [illegible] his daughter, but claimed it with plaintiff 2 on the ground that the latter was N's son and that she lived with him. **Ningawa v§Ramappa**

5 Bom L R 708=28 Bom 94

Notes.—Ref: 31 Bom 80; 8 Bom L R 897. Dist: 9 Bom L R 1054. 32 Bom 7.

1518—C P C O I rr 10 (2), (3), (5), 8 (2), 11 S 107 (2) O [illegible] r 11=(1882 Ss 32, 582)-Practice-Parties—Joinder of party in appeal-Suit relating to a public trust—Court's inherent power to add parties.

S. 32 C P C Coupled with [illegible] 582 gives [illegible] appellate Court power to add [illegible] parties to the original suit. Even if this be not so, S 32 is not exhaustive, and an appellate Court has inherent power in a case dealing with a public trust to add in the appeal such new parties [illegible] may be necessary for the protection of the public interests the public being interested in the appeal. **Gyananda Asram v. Kristo Chandra Mukherji.** **8 C W N 404.**

1519—C P C O I rr 10 (2), (3), (5) 8 (2), 11 O I r 8=(1882 S.32)-At any time—Partition suit—Addition of parties after judgment but before decree—The power of the Court to add parties under S. 32 depends on the question whether the case is *sub judice.* A partition suit in which judgment has been delivered adopting the report of the Commissioner and directing [illegible] decree to be drawn up in terms of the report is *sub judice* before the decree is engrossed on stamped paper and signed by the Judge, and the Court can add parties before it is so engrossed. **Jotindra Mohan Tagore v. Bejoy Chand Mahatap.**

32 Cal 488.

C P C (1908) 0 1 r 10=(1882 Ss. 27 32 33 —*Contd*

1520—*C* P C O 1 rr 10 (2), (3), (5), 8 (2), 11 -Parties-Jurisdiction of District Judge to add any party—Civil Procedure Code, S 32.

[illegible] 32 of the C P C is in no way inconsistent with S 53 of the Land Aquisition Act, and [illegible] District Judge has, therefore, jurisdiction to add any one interested in the compensation [illegible] a party to the proceedings before him, even though he was no party to the proceedings before the Collector. **Kishenchand v. Jagannath Prasad. 1902 A W N 215=25 All 133.**

Notes—Appr: 11 C W N 430.

1521—C P C O 1 rr 10 (2), (3), (5), [illegible] (2), 11 O 22 r 4=(1882 Ss. 368, 32)—Application for substitution to deceased defendant—Substitution of heirs under s. 368—Subsequent knowledge of Probate of will-Substitation of executors in place of heirs—Bona-fides—Limitation.

Where an applicant obtained substitute of [illegible] of the heirs of [illegible] deceased defendant under S 368 C P C., through want of sufficient information that probate of the will of the deceased had been granted, and subsequently applied, more than 6 months after death, to have the names of the said heirs struck out and that of executors substituted:— *Held*, that the application [illegible] under S 32 C P C and that even under S 368, C P C, it was not barred as the applicant has throughout had a *bona-fide* desire to effect substitution of the proper legal representatives and had shown sufficient cause for delay. **Syed Hossein Ali v Abdur Rahim. 7 C W N 529.**

1522—C P C O 1 r 10 (2), (3), (5), 8(2), 11—Ss. 7, 11, 46=S. 32 of 1882—Application by alleged adulteress to be made [illegible] party.

The alleged adulteress cannot be made [illegible] party to suit by a wife for divorce against the husband on the ground of incestuous adultery. The words "all proceedings under this Act between party and party" in s. 45 of the Act apply only to proceedings after the parties to the suit have been determined in accordance with the Act. [illegible] 7 of the Divorce Act does not apply to procedure. S. 32 of the C P C, cannot apply to the case of substitution, dismissal, or addition of parties in divorce proceedings. Also, her presence in the suit is not absolutely necessary for it. (L [illegible] 8 P D 217, 4 B L R (O C) 51, (1899) P 204 ref. to.) **Ramsay [illegible] Boyle** **30 Cal 489.**

C P C (1908) O 1 r 10=(1882 Ss. 27 32 33)—*Contd.*

1523—C P C O 1, rr 10(2), (3). (5), 8 (2), 11= S. 32—Order refusing to made parties—Revision.

Held that an order under s. 32 refusing to make the applicant party was not open to revision by the High Court under s. 622, Code of Civil Procedure as an appeal would lie from the decree in the case to the High Court.

Ghunrani v Raj Kumar. **2 W N 55.**

1524—C P C O 1 r 10 (2), (3), (5) 8 (2). 11=(1882 S. 32)—Parties, joinder of—Application to add party—Limitation for—Limitation regarding suit as to added party—Dismissal of mortgage suit against added defendant as barred by limitation —Effect of, on other defendants.

Held by the full Bench that a court, in joining parties under s. 32 of the C P C. is untrammelled by any question of limitation in respect of an application for such joinder, but the joinder cannot be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder. When a party defendant has been added to a suit either upon the application of the plaintiff or by the court of the plaintiff or by the court of its own motion, it is competent to him to take objection that as against him the suit is barred by limitation and if such objection is well founded it must prevail and the suit as against him must be dismissed.

When a person has been added as a defendant in a mortgage suit upon the allegation that he is interested in the equity of redemption, but no investigation had been made as to the extent, in any of his interest, if the suit is dismissed against him on the ground that it is barred by limitation the decree as against the others will stand; no question of the distribution of the mortgage debt could be decided as there are no materials.

Ram Kinkar Biswas v Akil Chandra Chowdhury. **2 M L T 137= 5 C L J 242 F B=11 C W N 350= [illegible] Cal 519.**

1425—C P C O 1 r 10 (2), (3), [5], 8[2], 11 O 1 r 10 [1] [4]=Ss 27, 32, 33—Order 1 Rule 10 —Amendment of Plaint—Substitution of new plaintiff—Suit barred—Computation of the period of Limitation—Limitation Act 1908 Section 22.

C P C (1908) O 1 r 10=(1882 Ss. 27 32 33)—*Contd.*

V and R minors by their mother and guardian M brought a suit on a promissory note not executed in their favour against [illegible] and others. On second appeal, it was held that they were not entitled to sue. An application was then made to bring M the right plaintiff on the record. The question arose whether at the date of the application for amendment the suit was barred.

Held, that the effect of an amendment is to date it as of the date on which the Court of First Instance ought to have made it and that could not be earlier than the date of the application.

The effect of s. 22 of the Limitation Act is that a mistake to be corrected under O. 1 r. 10 must be corrected before the limitation period of the suit expires. (30 Mad 419 Ref. 20 Mad 467: 21 Bom 680 and 14 Cal 400 Ref.) **Subbaraya Iyer v Vaithanatha Iyer.** **7 M L T 185= 33 Mad 115=5 Ind Cas 931.**

O 1 r 10 cl 2

See C P C [1908] O 1 r 1. Case No. [1461] **9 P W R 1908**

O 1 r 10 Cl 2—Whether a fresh defendant can be substituted for a sole defendant against whom no cause of action is found to exist—Notice under s. 424 [1882] is necessary in case.

See C P C [1908] S. 80. Case No [1095] **59 P W R 1908.**

C P C (1908) O 1 r 10 (4)=1882 S, 33

See Cases uuder:—

Parties

1526—C P C O 1 R 10 [2], [3], [5], 8 [2], 11 —Party addition of—Limitation.

In a suit to recover the price of work done to the Government where a servant of the Government was originally made the Defendant, and the Secretary of State was subsequently added as a Defendant.: *Held*—That the addition was not a rectification or substitution of the original Defendant, and for the purpose of limitation against the Secretary of State the suit should be considered to have been instituted on the date when he was made a party. **Mandardhar Aitch v. The Secretary of State for India in Council.** **[illegible] C W N 218.**

C P P (1908 O 1 r 10=(1882 Ss. 27 32 33)-*Concld.*

O 1 r 10 Cl 3

See C P C [1908] O 1 r 1. Case No. [1461]
9 P W R 1908.

—O 1 r 10 cl [3]

See cases under C P C [1908] O. 1 r 8 cl (2)

O 1 r 10 cl. (5)

See Cases under C P C O 1 r 8 cl (2)

—O 1 r 10 cl (5)

See C P C 1908 O 1 R 1 Case No 1461.
9 P W R 1908.

C P C O 1 r II=S..32

Notes—This rule corresponds with the last para of s. 32 of the C P Code of 1882. The word "*person*" has been substituted for the word "*plaintiff.*"

—O 1 r 11—

See C P C (1908) O 1 R 1. Case No 1461
9 P W R 1908.

—O 1 r 11—

See Cases under C P C (1908) O 1 r 8 cl. (2)

C P C O 1 r 12=S. 35 of 1882

Notes—This rule exactly corresponds to s. 35 of the C P Code of 1882, with this modification that the word "*where*" has been substituted for the word "*when*" in the beginning.

C P C O 1 r 13=S. 34 of 1882.

Notes—This rule corresponds to s. 34 of the C P Code of 1882 with some change in the language and phraseology, as will appear on a comparison of the two. The words "*unless the ground of objection has subsequently arisen*" are new.

C P C O 1 r 13

See (1) Parties—Non joinder of parties
(2) Misjoinder
(3) Parties—Objection as to defeat of parties

1527—C P C O 1 r 13=(1882 s. 34)—Non-joinder of parties—Objection—Limitation.

An objection as to the non-joinder of the parties alleged to be necessary ought to be raised by

C P C (1908) O 1 r 13=1882, S. 34) -*Concld.*

the defendant at the earliest opportunity; where this is not done and the parties omitted are in consequence not added until after the expiry of the period of limitation for a suit against them, the defendant will not be permitted to take advantage of the bar of limitation. **Hazari Mal v Bhavani Ram** **4 M L T 447.**

C P C O 2 r 1=S. 42 (1882)

See (1) Rent, suit for
(2) Res judicata—Matters in issue.
31 Mad 385.
(3) Parties—Adding parties to suits.
Oudh S C 302.

1528-1530—C P C O. 2 r 1=S. 42—Suit seeking declaration that property is saleable in execution of decree—Frame of suit—Court-fee—Act VII of 1870, s. 7 iv (c) v and sch. ii, art. 17 (iii)-Meaning of "consequential relief is prayed."

The Court executing a decree for money held by the appellant against the first respondent released from attachment certain properties, on the second respondent objecting to their attachment and sale on the ground that one of the properties had been given to her by deed by the first respondent and the other had been sold to her by deed by him. Thereupon the appellant sued, under s. 283 of the Code of Civil Procedure, praying for two declarations, (1) that the deeds of gift and sale be declared void as against her claims under the decree, and (2) that the two properties be declared liable to sale in execution of the decree as belonging to the first respondent. *Held*, that the suit was not open to the objection that it was not framed in accordance with the provisions of s. 42, Civil Procedure Code, the appellant having asked for all that she could ask for, and not being entitled to have the deeds delivered up, and cancelled. *Held*, aslo, that the words "consequential relief is prayed" in s. 7, IV, (c), and sch. II, art. 17 iii, Act VII of 1870, mean "is prayed from the Court trying" the suit brought to obtain the declaratory decree, "not from some other Court, which on the strength of such decree may be moved to grant some relief, such as restoration of an attachment and therefore that the suit did not fall under s. 7, IV, (c). *Held*, also, that the suit regarded as a suit to try the title did

C P C (1908) O 2 r 1=(1882 S. 42)

Contd.

not fall under s. 7. V. *Held*, also, that the suit in respect of the first declaration sought, required a Court-fee of Rs. 10 under art. 17, iii, sch. II, Act VII of 1870, and that in respect of the second declaration sought, it required a Court-fee of Rs. 10 under the same article, on the analogy of the ruling in 10 *Bom.* 610. *Held*, also that although it may be that the appellant might have obtained all the protection that she could require for her rights as judgment-creditor by praying for the latter declaration alone, a Court-fee of Rs 10 must be paid in respect of each of the reliefs claimed. **Hasin Bano v Riasat Ali. Oudh S C 225.**

S. 43. See Civil Procedure Code, 1882, s. 13. **5 O C 173.**

C. P. C. (1908) O, 2 r. 1

See also cases under:—

(1) Transfer of Property Act, 1882, ss. 85, 88.

(2) Res Judicata—Matters in issue.

1531—C. P. C. O. 2. r. 1. Expl. 11, 12, 43-Mortgage Suits—"Act VIII of 1859, Ss 2 and 7—"Cause of action," meaning of—"Matter directly and substantially in issue," meaning of—"Subjects in dispute," meaning of—Suit upon specific mortgage—Dismissal—Suit upon another mortgage:

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit on the ground that the mortgage or lease sued on is not proved is not thereby precluded either by reason of S. 43 or Expl 11 to S. 13 from seeking to redeem the property comprised in the former suit or a specific portion thereof on another specific mortgage or to eject the person in possession on the strength of his title. (20Cal 79 explained). The expression "subjects in dispute" in S.42 of the Civil Pro. Code does not connote the *corpus* or *object-matter* of a claim but signifies the *jural relation* between the parties to a suit, for the determination of which the suit is brought *i. e.* the cause of action or the subject matter of litigation or, in other words, the right which one party claims as against the other and demands the judgment of the court. The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit. The penalty for non-compliance with S. 42 is provided by S. 43 and Expl 11 to S. 13. The expression "matter directly and substantially in issue" in S. 13, will include not only the cause of action on which the suit is based but also all matters which are or ought to be, put in issue for the determination of the cause of action. Ss. 13 and 43 C. P. C. are not exhaustive of the law of *res-judicata* and this law has been the same under both the old and new Codes and is the same as the English Law. The absence in S. 13 of the Code of 1882 (XIV) of the expression "cause of action" found in the old Code (Act VIII of 1859, S. 2) does not denote any deliberate change in the law, and S. 13 does not require every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and which he may then be aware of. It is not the law that if a plaintiff sued for certain property on a false claim or cause of action when in reality he has in fact and law, a true claim and cause of action for the same property of which he is aware he must be taken in law to have abandoned or relinquished his true claim and cause of action. (23 Mad 259, treated as overruled by the Full Bench decision in 26 Mad 104.) **Ramaswami Aiyar v Vythinatha Aiyar. 13 M L J 448.**

C P C (1908) O 2 r 1=(1882), S. 42

-Concld.

1532—C. P. C. O. 2 rr. 1, 2-Suit premature-Dismissal-Further suit-Scope of Ss. 42, 43. S. 43 of Civil Procedure Code, is not applicable to a case where a suit is dismissed as premature and as brought without any cause of action. So, when the cause of action arises, a subsequent suit for the claim is maintainable. S. 43, Civ. Pro. Code, explained. **Ahmad Khan v Mehr Khan 35 P R 1893.**

C. P. C. O. 2 r. 1—See C. P. C. O. 3. r. 4. Case. No. 1600. **36 Cal 609.**

C P C O. 2 r. 2=S. 43 of 1882

Notes—This rule corresponds with section 43 of the C. P. Code of the 1882. The important changes introduced in this rule are the substitution of the word "*relief*" for the word "*remedy*" in sub-rule 3 and the omission of the words "*obtained before the first hearing*" which occurred in the old Code after the words "*leave of the Court*" in the same clause.

The words "*and successive claims arising under the same obligation*" have been added after the word "*performance*" in the explanation.

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1 Ommission to sue for and relinquishment of part or whole of claim. (1533-1544)

I Special cases under O 2 r 2.

- **(a) Suits for mesne profits and possession (1545-1550)**
- **(b) Suits for arrears of rents of successive years (1551-1552)**
- **(c) Declaratory suits (1553)**
- **(d) Mortgage suits (1554-1557A)**
- **(e) Successive application for execution of different reliefs (1558)**

II Miscellaneous cases 1559-1561.

See Cases under :—

1 Onus of Proof—Relinquishment of portion of claim.
2 Relinquishment of, or ommission to sue for, portion of claim.
3 Right of suit.

C P C (1908) O 2 r 2, O VI r 17 O VII r 11—Plaint—Amendment of plaint.
(1885) A W N 167.

C P C (1908) O 2 rr 2, 6 & O VI r 17—
Misjoinder—of causes of action.
41 P R 1887.

O II, r 3, O XXI, r 63, [illegible] 73—Misjoinder—of causes of action,
43 P R 1897.

(1) OMISSION TO SUE FOR AND RELINQUISHMENT OF PART OR WHOLE OF CLAIM.

1533-1534—C P C O 2 r 2=(1882 S 43)-Fee for medical attendance-Part paid by writing a promissory—note—Suit on promissory-note—Second suit for balance barred.

P, a medical man, was engaged by R, defendant's father, on Rs. 100 per day. For a portion of the fee, R executed a promissory-note, and the balance was agreed to be set off against R's fee for conducting a case of P in a Civil Court. After R's death, P sued the defendant on the promissory-note and got a decree. He then brought this suit for recovery of the balance, which was to be set off, and also a further sum for subsequent attendance, on the ground that, *R* having died, he (R) could not perform his part of the contract. *Held*, that the suit was barred by the provisions of S 43. The causes of action of the two suits were in reality the same, that is, the breach, of the agreement to pay Rs 100 per diem, and the fact that a promissory-note was given, in satisfaction of part of the debt, did not take the case out of the *S* 43. When the plaintiff brought his first suit R was dead, and he could fall back upon the original agreement. But the suit for fees for subsequent attendance was not barred.

Prio Nath Mukerji v Bishvanath Prasad.
4 A L J 85=A W N (1907) 41=
29 All 256.

1535—C P C O II, r 2—Suits in respect of different parcels of land-Different causes of action—Alternative claim common to all different suits.—Mortgage—Redemption. **10 C L J 83=**
3 Ind Cas 395.

1536.—C P C O 2 r 3, cl 2 and 3—Contract Act, S 43—Joint effect of—Omission of claim in prior suit against one promisor no bar to suit against a co-promisor :—

The rule in King v. Hoare is a judgment and consequently even if the principle be applicable to India where a claim was omitted as against a promisor and subsequent suit is brought as against his co-promisor in respect of the omitted portion the subsequent suit is neither barred by S 43 C P C, (1882) or Section 43 of the Contract Act.

Ramanjulu v Aravamadu Ayingar.
33 Mad 317.

(1) Omission to sue for and relinquishment of part or whole of claim—*Concld.*

1537-1543.—C P C O 2 r 2—(1882 s 43)-Code of Civil Procedure (Act XIV of 1882) sec 43—"suit" plaintiff include what—sec III—set off, omission to calim portion, effect of—Subsequent suit for such portion barred.

Where under sec III C P C the defendant claims to set off an ascertained [redacted] of money against the plaintiff's demand, he is bound to include in his cross-claim, the entire amount due to him in respect of the same cause of action, and is not entitled to split it up and claim [redacted] set off as to [redacted] portion thereof and then [redacted] in respect of the balance such a suit would be barred under the provisions of sec 43 C P C.

The terms 'suit' and ' plaintiff ' in sec 43 C P C include a claim for set-off and a defendant claiming the [redacted] respectively. **Nawbut Pattak v Mohesh Narayan Lal. 1 C L J 364=**

32 Cal 654.

1544.—C P C O 2 r 2—(1882 secs 373, 43) Suit—Omission of part of claim—With drawal without leave to withdraw on condition–Non fulfilment of condition—Effect.

If a Plaintiff withdraws from a suit without the leave of Court, section 43 of the Civil Procedure Code is [redacted] bar to his instituting [redacted] fresh suit in respect of any portion of the claim which he may have omitted to include in his previous suit. The same consequences follow when a plaintiff is allowed to withdraw with liberty to bring [redacted] fresh suit on condition of paying the Defendant's costs within a certain time and fails to pay such costs within that time. **Hare Nath Das v Syed Hossain Ali. 10 C W N 8.**

[redacted] SPECIAL CASES UNDER O 2 R 2.

(a) Suits for mesne profits and possession.

1545.—C P C O 2 r, 2 (1882 [redacted] 43)—Possession—Cause of action—Splitting—Certificate of sale—Suit for exclusive possession of lands–Suit to recover share in joint land.

Per Chandavarkar and Astone JJ.—Where the purchaser at a Court sale [redacted] to recover exclusive possession of certain lands belonging to the judgment-debtors, and on the termination of the proceedings in his favour, he institutes an-

(2) Special [redacted] under O 2 r 2—*Contd.*

other suit to recover by partition the share of the judgment-debtors in other lands which [redacted] held by them jointly with their co-parceners, his second suit is not barred by the provisions of S 43 of the Civil Procedure Code, although he bases his claims in both the suits upon the self-same certificate of sale issued to him by the Court.

Per Crowe J. (dissenting)—Both in this suit and the previous litigation plaintiff has relied on the title [redacted] evidenced by the certificate of sale. He may be entitled to more than one remedy in respect of the same cause of action, and he may sue for all or any of his remedies, but if he omits (without leave of a Court obtained before the first hearing) to sue for any of such remedies he shall not afterwards sue for the remedy [redacted] omitted. **Narayan v Shamrao. [redacted] Bom L R 233= 27 Bom 379.**

Notes ;-Fol 7 C L J 384.

1546—C P C O 2 r 2 [redacted] 11—Expl IV O 2 r 2—Ss. 13 Expl. II, 43—Partition suit for possession of [redacted] house alleged to have been partitioned in proceedings before a Court of Revenue—Subsequent suit for partition of the [redacted] house in [redacted] Civil Court. As the result of the partition proceedings in a Court of Revenue the sites of certain houses were partitioned. The plaintiffs believing that the buildings themselves had been partitioned brought a suit for the recovery of their share in the house alleging a dispossession from their share by the defendants. But they were defeated in this suit upon the ground that the supposed partition of the houses by [redacted] Court of Revenue never could have taken place. Upon [redacted] second suit brought by the plaintiffs in [redacted] Civil Court asking for partition of the house property *held* that neither S 13 nor 43 C P C was a bar.

Balbhapadar Nath [redacted] Ram Lal.
1904 A W N 89=26 All 501=
1 A L J 228.

1547—C P C O 2 r 2 S 9—Civil Procedure Code S 43—Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits— Burden of proof:—One Lachmi Narain died possessed of certain immoveable property. He left him surviving [redacted] widow Mukhta Kunwar. Narain Das obtained possession of some portion of the said immoveable property, as he alleged under a lease from Mukhta Kunwar, and held possession at any rate for some months, down to the 27th November 1877. After the death of Mukhta Kunwar one Sheo Kunwar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process dispossessed Narain Das. Narain Das thereupon instituted a suit under S. 9 of the Specific Relief Act, and having obtained a decree in that suit was restored to possession. He then instituted a suit against Sheo Kunwar to recover mesne profits for the time during which he was out of possession. As to this suit it was *held*, (1) that the suit was not liable to be defeated by reason of S. 43 of the Code of Civil Procedure and (2) that the other issues that arose in the suit were whether the defendant was the true owner of the property, the burden of proving which was on him; and, if defendant established, his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitled him to remain in possession as against the defendant.

Sheo Kunwar v Narain Das
1902 A W N 139=24 All 501.

1548—C P C O II r 2 s 47—Suit for possession of land—Wrong description of land given in plaint and in the decree-Order passed for execution, in respect of the property claimed but wrongly described in the decree, reversed—Fresh suit for declaration in respect of such property, whether barred. **5 M L T 294=1 Ind Cas 806.**

1549—C P C O 2 r 2=(1882 s. 43)—Cause of action-Whether same for a suit for specific performance of a contract to reconvey land and for the mesne profits of the property—Specific Relief Act (1 of 1877), S. 19.

A suit for specific performance of a contract to reconvey a certain plot of land after its breach and the claim for mesne profits of the property, to which the plaintiff is entitled in consequence of the delay on the defendant's part to execute the reconveyance, [illegible] based on the same cause of action.

A plaintiff instituted a suit for the specific performance of a contract to reconvey a plot of land, in which he did not claim mesne profits to which he was entitled in consequence of the

defendant's delay in performing the contract; subsequently to the decree for specific performance, he brought another suit for the mesne-profits; *held*, that the plaintiff's suit for mesne-profits that accrued due before the institution of the suit for specific performance was barred under S. 43 C P C. **Ganesh Ram Pal v Mohesh Ram Pal** **13 C W N 669**

1550—C P C O 2 r 2=(1882 s 43)—Suit to recover possession—Fresh suit, to recover mesne profits.

Held that a subsequent suit for mesne profits is not barred by the provisions of sec 43, Civil Procedure Code, where a suit for possession of the lands for which mesne profits are claimed has already been filed, (11 Mad 210; 9 Cal 283; 19 Cal 615; Fol. 11 Mad 151 Not fol.)

Gutta Saramma v Maganti Ramanedu.
4 M L T 192=31 Mad 405.

(b) Suits for arrears of rents of successive years.

1551—C P C O 2 r 2 (1882 s. 43) same cause of action—Suit for possession—Subsequent suit for arrears of rent.

The property in suit was a house let on an agreement under which the tenant underlook, to vacate the premises on a month's notice. The notice was duly given, but the tenant did not surrender. The landlord sued for possesson and obtained a decree and then sued for arrears of rent due under the lease. The question was whether the suit was barred by sec. 43 of the Civil Procedure Code and whether the claim for rent was a part of the claim which the plaintiff was entitled to make in respect of the cause of action on which he founded his suit for possession.

Held, that the causes of action were clearly different. The cause of action for any portion of the rent is complete when that part of the rent is due and is unpaid; the cause of action for the recovery of property does not arise until the tenancy is determined the one is founded on the obligation to pay for the occupation, the other on the obligation to withdraw from the occupation.

A claim "in respect of" a cause of action is a claim "founded on" that cause of action and the difference between a claim "founded on" a cause of action and a claim "arising out of" a cause of action seems to be more a difference of metaphor than a difference in the quality of the claim. (19 Cal 615; 11 Mad 151; 11 Mad 210; 9 Cal 283; 17 All 533; R S A 614 of 1905 Fol: 27 Mad 116 Dist:). **Subbarya Chetti v Rathnavleu Chetty 5 M L T 105=32 Mad 330=2 Ind Cas 313.**

1552—C P C O 2 r 2 (1882 S. 43)—Suit for rent—Prior suit for rent for a subsequent fasli. Separate Muchilika-Bar—Vendors-Suit for price of goods sold:—

A suit for rent for a particular fasli will bar a subsequent suit for a prior fasli, the cause of action in both cases being the same, *i. e.* the tenancy, even though the rents became due under different documents and at different times *Obier.* —A vendor must sue for the price of all goods sold till the date of plaint. (4 M H C R 343 1 Exch. 479 followed.) **Shanmugam Pillai v Syed Gulam Ghose 27 Mad 116.**

Notes:—Ref: 32 Mad 330.

(c) Declaratory suits.

1553—C P C O 2 r 2; O 23 r 1=(1882, Ss. 43 and 373)—

First suit for declaration of right and partition—Second suit for partition of joint property—Cause of action identical—First suit withdrawn-Second barred—Limitation Act (XV of 1877), Art, 106—Suit for partition, a suit for a share in dissolved partnership.

The plaintiff brought a suit for declaration that certain property in Moradabad District purchased by the defendant in his name, was purchased with the money belonging to the parties and taken out of the partnership business of which the parties were joint owners and for partition of that property. The suit was withdrawn without permission to bring a fresh suit as the parties referred the matter in dispute to arbitration. The arbitration fell through and the plaintiff brought the suit for partition of certain property situate at Naini Tal which had been purchased in the joint names of the parties. In the plaint, he alleged that the property at Naini Tal was purchased with the profits of the partnership business. *Held*, that the cause of actions in both the suits were identical and the second suit was barred by S. 43 of the Code of Civil Procedure as the plaintiff ought to have included his present claim in the first suit. *Held*, further, that the suit was barred by S. 373 of the Code. Held further, that the suit was also barred by Art. 106 of the Limitation Act inasmuch as it was suit for a share in the profits of a partnership which had been dissolved more than 3 years before the suit. **Nias Ahmad v Abdul Hamid. 5 A L J 278= A W N (1908), 131=30 All 279.**

(d) Mortgage suits.

1554—C P C O 2 r 2=(1882 s. 43)—Cause of action—Account stated—Mortgage transaction.

The defendant traded in Zanzibar as the agent of one Khimji, who owned five shops within the German jurisdiction. To release from attachment these shops, the defendant obtained from the plaintiff a sum of Rs 7,000 out of which he applied Rs. 5,869 in discharge of the attachment, and returned the balance to the plaintiff. As a security for the repayment of Rs. 5,869, the defendant became personally responsible for the amount, and as part of the same transaction, he got a mortgage in own favour from Khimji of the five shops and in turn sub mortgaged them to the plaintiff. As a result of these transactions, the plaintiff debited Rs. 2,753 in the general account which was in the name of the defendant. The plaintiff then brought Suit No. 193 of 1899 against the defendant to recover the balance due on this general account; and a few days later he brought another Suit No. 196 of 1899 for the purpose of enforcing certain rights under the sub-mortgage. The first suit was decided in the plaintiff's favour; but the second was thrown out on the ground that it was barred under S. 43 of the Civil Procedure Code.

Held, that the second suit was not barred by s. 43 of the Civil Procedure Code, since the two claims were not in respect of the same cause of action. The cause of action in the earlier suit was an adjusted account in respect of the transaction arising out of the mortgage; and the mortgage constituted a cause of action itself in the second.

An account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. **Hansraj v Lalji. 6 Bom L R 454=28 Bom 447.**

1555.—C P C O 2 r 2 Ss.13 Expl II, 42, 43-Mortgage Suits—"Act VIII of 1859 Ss. 2nd and 7"—"Cause of action" meaning of—"Matter directly and substantially in issue" meaning of—"Subjects in dispute." meaning of Suit-Upon specific mortgage—Dismissal—Suit upon another mortgage.

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit on the ground that the mortgage or lease sued on is not proved is not thereby precluded either by reason of S. 43 or Expl. II to S. 13 from seeking to redeem the property comprised in the former suit or a specific portion thereof on another specific mortgage or to eject the person in possession on the strength of his title. 20 Cal 79 explained. The expression "subjects in dispute" in S.43 of the Civil Procedure Code does not connote the *corpus* or *object matter* of a claim but signifies the *jural relation* between the parties to a suit, for the determination of which the suit is brought *i. e.*, the cause of action or the subject matter of litigation or in other words the right which one party claims as against the other and demands the judgment of the court. The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant, in respect of the *corpus* or object matter of the suit. The penalty for non compliance with S. 42 is provided by S. 43 and Expl II to S. 13. The expression "matter directly and substantially in issue" in S. 13, will include only the cause of action on which the suit is based but also all matters which are or ought to be, put in issue for the determination of the cause of action. Ss. 13 and 43 C P C are not exhaustive of the law of *res-judicata* and this law has been the same under both the old and new Codes and is the same as the English Law. The absence in S. 13 of the Code of 1882 (XIV of 1882) of the expression "cause of action" found in the old Code (Act VIII of 1859, S. 2) does not denote any deliberate change in the law, and S. 13 does not require every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and which he may then be aware of. It is not the law that if a plaintiff sued for certain property on a false claim or cause of action when in reality he has in fact and law, a true claim and cause of action for the same property of which he is aware he must be taken in law to have abandoned or relinquished his true claim and cause of action. 22 Mad 259, treated as overruled by the Full Bench decision in 26 Mad 104. **Ramaswami Aiyar v Vythinatha Aiyar. 13 M L J 448.**

1556—C P C O. 2 r. 2=(1882 S.43)—Suit for redemption decree—Second suit for surplus profits recovered by mortgagee during mortgage not maintainable—Effect of Art. 105, Limitation Act (XV of 1887).

Art. 105 of the Limitation Act must not be construed so as to conflict with the provisions of S. 43 of the Code of Civil Procedure, and must be deemed to refer to cases which the mortgagor has got possession for the mortgaged property otherwise than by a suit for redemption. (7 W R 564 and 34 Cal 223 Ref:). Where a mortgagor brings a suit and obtains a decree for redemption he cannot maintain a second suit for recovery of surplus collections made by the mortgagee, during the period of the mortgage, S. 43 of the Code of Civil Procedure being a bar to the maintenance of that suit.

Per Karamat Husain, J.—The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage-debt has been satisfied, is inconsistent with the principles on which the law of redemption is based (26 Bom 661, 31 Bom 527; 34 Cal 223; 4 A L J 763; 6 B H C R 97 (99); 8 Cal 593; 19 Cal 615 Ref:). **Ram Din v Bhup Singh, 5 A L J 192 =A W N (1908), 96=30 All 225.**

1557—C P C O. 2 r 2=S. 43 and S. 13 Expl. II—Suit on one mortgage no bar to subsequent suit on another mortgage of same property.

A suit brought by A against B on an alleged mortgage which was dismissed, is no bar to another suit by A against B on another mortgage in respect of the same properties under ss. 43 and 13 of the Code of Civil Procedure

(2) Special cases under O 2 r 2—*Concld.*

(22 Mad 259 overruled. 26 Mad 760 followed 27 Mad 102 followed.) **Thrikaikat Madathal Raman v. Thiruthival Krishnen Nair, 29 Mad 153.**

1557A—C P C O 2 r 2—Transfer of Property Act Section 99—Sale of mortgaged property in execution of money decree held by mortgagee set aside—Subsequent suit for sale on mortgage not barred.

Where a mortgagee had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, and such sale was set aside with regard to the provisions of S. 99, T.P.A.—*Held*, that the mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage, notwithstanding S. 43 C P C. (16 All 415; 25 Bom 161 ref. to).

Bhola Nath v. Muhammad Sadig. 1904 A W [illegible] 2=26 All 223.

Notes:—Ref: 5 A L J 732; (1908) W N 265. Dist: 31 All 19.

(e) Successive applications for execution for different reliefs.

1558—C P C O 2, r 2 (=s. 43, Civ Pro. Code, 1882)—Execution of decree — Successive applications for execution in respect of different reliefs granted by same decree.—

S. 43 of the Civ Pro Code, is not applicable to proceedings in execution decrees. So held by *Edge, C. J., Tyrrell, Knox, Blair and Burkhitt, JJ.*—Where a decree grants different reliefs, as for example, possession of land and mesne profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief. So held by *Edge, C. J., Tyrrell, Blair and Burkhitt, JJ.* (18 Cal 515, Ref:) **Sadho Saran v. Hol Pande, A W N 1893, 57=19 All 98.**

(3) MISCELLANEOUS CASES.

1559—C P C O. 2 r 2=(1882 s. 43)—Cause of action—Parties.—

The purchaser at a revenue sale brought a suit to annul incumbrances against certain cosharer under tenure holders and got a decree. Subsequently he leased the property to plaintiff who brought a second suit to annul incumbrances against the remaining co-sharers. *Held*,—That S. 43 [illegible] no bar **Shubhadra Dassya v. Chandra Kumar Nag, 8 C W N 54.**

(3) Miscellaneous Cases—*Concld.*

Notes:—Fol: 3 C L J 260.

1560—C P C O 2 r 2=(1882 S.43)—Contract of sale—Suit for specific performance—Failure—Subsequent suit for money paid.—

S. 43 is no bar to a suit for return of money paid as consideration after failure in previous suit for specific performance of the contract. (6 Mad 760 ref. to.) **Parangodan Nair v. Perumtoduka Illot Chata, 27 Mad 380.**

1561—C P C O 2 r 2=(1882 s. 43)-Plaintiff *prima facie* entitled to possession—Onus of proving that case falls under s. 43 is on defendant.—

Plaintiff's non-possession at the time of prior suit does not discharge the burden. (11 M I A 551; 15 Cal 800; 15 I A 106, Ref:)
Shibba v. Dalbat, 2 Ind Cas 115.

—O. 2, r. 2—See C P C (1908) O 2 r 1, Case No. 1530. **108 P R [illegible]**

—O. 2, r. 2—See C P C O 2 r 1, Case No. (1632). **[illegible] P R 1893.**

—O. 2, r. 2—To appoint a trustee and to recover trust properties—Joinder of parties.—**See** C P C (1908) S. 92, Case No. (1142). **4 L B R 183.**

—O. 2, r. 2—Is no bar to a subsequent suit—C P C O 34 r 14—**See** C P C O 34, r. 14, Case No. 2901. **[illegible] Bom 161.**

C P C O. 2 r 3=S. 45 of 1882.

Notes:—This rule corresponds to section 45 of the C P Code, 1882 with some modifications and changes. The words "*save as otherwise provided for*" have been substituted for the words "*subject to the rules contained in Chapter II, and in section 44*" which occurred in the old section.

The second para of section 45 has been omitted from this rule and has been made a separate rule. (Rule 6).

Sub-rule (2) corresponds with para [illegible] of section 45 of the old Code; but its last sentence has been omitted.

For the meaning of the term *cause of action*, see rule 2.

—0. 2, rr. 3, 6 of 1908=1882 S. 45.

See Cases under Multifariousness.

C P C O 2, r. 3—See Joinder of causes of action. **(1909) 6 A L J 456.**

C P C O 2 rr 3, 6—C P C (1882) S. 45**—See** Jurisdiction—Causes of jurisdiction — Cause of action. **41 P R 1887.**

1562—C P C O 2 rr 3,6=(1882 S.45)—A suit for both enhancement and arrears of rent at an enhanced rate is maintainable.

The causes of action, although separate, may be combined under S. 45, Civil Procedure Code. **Gundar Tewary v. Brij Nandan Pershad, 5 C W N 880.**

1563—C P C O 2 rr 3, 6=(1882 S. 45)—Application of, to N. W. P. Tenancy Act—Suit for rent—Separate holdings-Joint suit not maintainable.

S. 45 of the Code does not apply to suits for rent. A landlord cannot bring a joint suit for rent of several holdings, both occupancy and non-occupancy. The N. W. P. Tenancy Act contemplates separate suit for arrears of rent in separate holdings. **Jagannath Prasad v. Tore, 3 A L J 610=A W N (1906), 253 =29 All 18.**

1564—C P C O 2 rr 3,6=(1882 S. 45)—Joinder of defendants — Possession under separate deeds—One cause of action.

Where property is transferred, under separate deeds, at different times, to different transferees, and the plaintiff brings one suit for possession against all the transferees, *held*, that the suit is not bad for multifariousness. In a suit for ejectment against several defendants, who set up various titles to different parts of the land claimed, there is only one cause of action, and not several distinct and separate causes of action.(16 All 279 Dist: 21 Cal 831 and 29 Cal 871 Fol:)

Parbati Kuar v. Mahmood Fatima, 4 A L J 181=A W N 1907,36=29 All 267.

1565—C P C O 2 rr. 3, 6; O 1 rr. 3, 4=(1882 Ss. 45, 28)—Possession of land, suit for causes of action, joinder of—Parties, joinder of.—

Where a purchaser of lands, from Defendant No. 2 being dispossessed by Defendant No. 1, who also claimed by purchase from Defendant No. 2, sued Defendant No. 1 for possession and an alternative claim for refund of purchase money against Defendant No. 2.

Held, that there was only one cause of action viz. dispossession of plaintiff from the land.

Held, also-That Defendant No.2 was a necessary party to suit. (19 Cal 123; 8 Cal 963 fol: [illegible] Cal 821 Dist:) **Serajul Huq Khan v Dinabundhu Sen, 6 C W N 300=29 Cal 257.**

Notes:—Dist: 6 C W N 585. Ref: 31 Mad 252 =18 M L J 238.

—0. 2, r. 3—See C P C O 2 r 4, Case No. 1566. **32 All 14.**

C P C 0. 2, r. 3—See C P C (1908) S. 24, Case No. (98). **1 A L J 188.**

—0. 2, r. 3—See C P C O 2 r 4, Case No. 1574. **33 Cal 425.**

—0. 2, r. 3—See C P C O 2 r 6, Case No. 1576. **33 Cal 601.**

—0. 2, r. 3—See C P C O 1 r 3, Case No. (1468). **19 M L J 399.**

—0. 2, r. 3—To appoint a trustee and to recover trust properties—Joinder of parties. **See** C P C (1908) S. 92, Case No. (1142). **4 L B R 183.**

C P C O. 2, r. 4=S. 44 of 1882.

Notes:—This rule corresponds to rule (*a*) of section 44 of the C P Code of 1882, with several modifications. The word "or to obtain a declaration of title to immoveable property" which occurred in the last sentence of section 44, rule (*a*) have been omitted. The words "*or any part thereof*" have been added to cl. [*a*]; clause [*c*] of section 44 of the old Code has been omitted & a new clause has been substituted in its place. The proviso to this rule is new. Rule (*b*) of section 44 of the C P Code, 1882, has been made a separate rule. [Rule 5].

C P C O. 2, r. 4.

See Cases under O. 2, r. 5.

—O. 2, rr. 4, 5 of (1908)=S. 44 of (1882).

See Cases under Joinder of Causes of Action.

C P C O 2 rr 4. 5=(1882) S 44—See Multifariousness. **79 P R 1899.**

1566—1567—C P C O 2 r 4 (para 1)=S. 44 (a).

Suit for moveable and immoveable property maintainable if cause of action same—Suit for partition:—**See 6 Bom L R 1.**

1568-C P C O 2 rr 4,5=(1882 s 44)-Immoveable property—Right of way—Joinder of causes of action.

Section 44 of the Code of Civil Procedure should be construed liberally. The word immoveable property, in Rule (a) of that section includes a right of way (19 Cal 514; 23 Bom 673; 35 Cal 889 31 W R 178 Ref:). **Bejoy Chandra v Banku Behari. 9 C L J 336=13 C W N 451.**

1569—C P C O 2 rr 4, 5=(1882 S.44) application of—Misjoinder of causes of action.

S. 44 is not applicable to a suit unless it is for the recovery of immoveable property or for declaration of title to immoveable property. Even in these cases defect of multifariousness is cured, if leave of the court is obtained previous to the bringing of the suit. **Rai Nanda Lal Bose v Nistarni Dassea. 7 C W N 353.**

1570—C P C O 2 rr 4, 5=(1882 S. 44)—Misjoinder of causes of action—Suit by widow against husband's brothers for husband's share of joint property—Moveable and immoveable—Limitation.

There can be nothing irregular in seeking to recover in one suit both moveable and immoveable property if the cause of action is the same in respect of both. *Held*, in a suit brought by a Hindu widow to recover from her deceased husband's brothers, her husband's share in the family property (moveable and immoveable) where the cause of action was found to have arisen in the refusal of the latter to recognise the widow's right to succeed to that share under a partition which had not been completed by actual division at the time of her husband's death. That s. 44, Rule A of the Civil Procedure Code was no bar to the suit nor, consequently, would the claim as regards the moveable property be barred by limitation. (10 Mad 375) followed. **Chowdhry Ganesh Dut v Musstoo Jewach Thakoorain. 8 C W N 146=14 M L J 8=31 Cal 262=31 I A 10 P C.**

1571—C P C O 2 r 4 (para 1)=(1882 s. 44).

Misjoinder of defendants or causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferees from such other heir.

A plaintiff came into court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held*, that there was no misjoinder of parties or of causes of action in such a suit. (11 All 33 fol.) With reference to the objection that the claim included both moveable and immoveable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was held that s. 44 of the Code of Civil Procedure did not apply to such a case. (10 Mad 375 at p 506 ref to.) **Mazhar Ali Khan v Sajjad Husain Khan. 1902 A W N 85=24 All 358.**

Notes—Fol: 4 A L J 121; W N (1907) 36; 29 All 267; 30 All 560 F B=(1908) W N 235; 5 A L J 647 F B.

Joinder of claims for mesne profits or arrears of rent.

1572—C P C O 2 rr 4, 5=S. 44 of 1882.

Suit to recover possession of property belonging to religious institution, with mesne profits

C P C (1908) O 2 r 4=(1882, S.44)-
Contd.

realized therefrom—Whether bad for misjoinder of causes of action—**Limitation Act, 1908,** arts 134, 144,. **35 P W R 1908, F B= 102 P L R 1908=30 P R 1908.**

Joinder of claims by mortgagee to enforce any of his remedies.

1573—C P C O 2 rr 4, 5=[1882 s. 44]—Suit for sale or foreclosure on two mortgages.

S. 44, O P O, has [illegible] application where the mortgagee [illegible] for sale or foreclosure of the mortgaged properties combining in the same suit both the mortgages which he holds over separate properties. (5 Mad 161; 17 All 274 fol.)

Raghubar Dayal v Jivala Singh. 25 All 229=1903 A W N 19.

Notes—Ref: 3 A L J 123=[1906] W N 54.

1574—C P C O 2 rr 4, 5: rr 3; 6=(1882 Ss. 44 and 45]-Misjoinder of parties and causes of action —Mortgage suit—Joinder of persons claiming adversely to mortgagor.

A suit to enforce a mortgage, in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee are sought to be investigated, is open to objection on the ground of misjoinder and multifariousness under Ss. 44 and 45 C P C (2 C L J 602 Ref) **Jajneswar Dutt v Bhuban Mohan Mitra. 3 C L J 205= 33 Cal 425.**

1575—C P C O 2 rr 4, 5=S. 44 [b] [1882]— Executors, administrators and heirs as such—Legatees and next of kin—Points of difference between—Misjoider of causes of action.

Those to whom rule (b) of S. 44 of the Civil Procedure Code relates, have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as for instance legatees or next of kin and yet they are not named in rule (b). But the common characteristic of executors, administrators and heirs which is not shared by legatees and next of kin is that the former not only acquire title from the deceased but they may represent him. In this is to be found the clue to the meaning of the rule.

Thus a claim may be made by or against heir of a deceased Hindu as his representative, and again the same person may claim for his own benefit and in his own personal right property of which the beneficial ownership has devolved on him by inheritance from, that is to say, as heir to this deceased Hindu. His legal capacity in the two cases is absolutely distinct, and it is only in reference to his representative capacity that it can be said a claim has been made by or aginst an heir as such. **Hafizaboo v Mahomed Casam. 8 Bom L R 734=31 Bom 105.**

C P C (1908) O 2 r 4 (1882, S. 44)-
Concld.

C P C O 2 r 5.

See C P C (1908) O I r 9 Case No (1503). **24 All 358.**

See also Cases under O 2 r 4.

C P C (1908) O 2 r 6 S. 45 of 1882.

Notes—This rule corresponds with para 2 of section 45 of the C P Code, 1882 with some modifications and changes. The words "*at any time before the first hearing, of its own motion, or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree,*" which occurred in the old section after the words "Court may," have been omitted; and the words "*for the separate disposal thereof*" which occurred in the last sentence of the old section, after the word "expedient," have also been omitted. See also section 47 of the old Code.

1576—C P C O 2 rr 6, 3=(1882 s. 45)—Suit for rent due and for money due in respect of fishery attached to the holding—Jurisdiction of Civil Courts:—

A suit for rent due in respect of an agricultural holding and for a sum of money due by the defendant in respect of a fishery attached to the holding is not bad for misjoinder of causes of action (vide S. 45 C P C.) and a suit for the rent due in respect of a fishery is cognizable by a civil court in its ordinary original jurisdiction.

Shib Prosad Chaudhuri v Vakai Pali. 33 Cal 601.

Notes—Ref: 7 C L J 152.

—O 2 r 6—See C P C O 2 r 3 Case No (1564) **29 All 267.**

—O 2 r 6—See C P C O 2 r 4 Case No 1566. **32 All 14.**

C P P (1908 0 2 r 6=(1882, S. 45) -Concld.

—0 2 r 6—See C P C (1908) S. 24. Case No. (98). **1 A L J 188.**

—0 2 r 6—See C P C O 2 r 3. Case No (1565) **29 Cal 257.**

—0 2 r 6—See C P C (1908) O I r 3 Case No (1469). **29 Cal 257.**

0 2 r 6—See C P C O 2 r 4 Case No 1574. **33 Cal 425.**

—0 2 r 6—See C P C (1908) O 1 r 3 Case No (1468). **19 M L J 399.**

C P C (1908) 0 2 r 6—Auction purchaser. See C P C (1908) S. 47 Case No. 272. **58 P R 1888.**

C P C 1908) 0 r 2 r 7.

Notes—This rule embodies in a very concise form the sum and substance of the provisions contained in sections 46 and 47 of the C P Code of 1882. It is analogous to Order 1, rule 13, of the present Code, with this difference, that the said rule relates to objections as to non-joinder or misjoinder of parties, whereas this rule relates to misjoinder of causes of action.

C P C 0 2 r 7.

C P C (1908) 0 2 r 7—Auction—purchaser See C P C (1908) S. 47 Case No 272. **58 P R 1888.**

C P C (1908) 0 2 r 21—Assignee of decree—Whether separate suit lies a question not of any practical importance—Equitable defences. See C P C (1908) S. 47. Case No. 215. **7 Ind Cas 55.**

C P C 0 3 r 1 S. 36 of 1882.

Notes—This rule corresponds to section 36 of the C P Code of 1882 with the following modifications. The words "*in such*" have been substituted for words "*to a*" after the words, 'by a party;' the word "*where*" has been substituted for the word "*when*" after the word, 'except;' and the words "*or appeal*" which occurred in the old section after the word suit, have been omitted.

See Cases under:—

(1) Advocate. Case No. (4). **[illegible] All 617.**

C P C (1908) 0 3 r 1=(1882, S. 36) -Contd.

(2) Lunatic

(3) Pleader—Appointment and Appearance.

—0 [illegible] r 1—See C P C O 10 r 4. Case No 1983 **6 A L J 340.**

C P C 0 3 r 1=S. 36 (1882) See Plaint—Verification and signature. **16 C P L R 103.**

C P C [1908] 0 3 r 1=1882 S. 36:—See Practice-Civil cases—Inspection and production of documents. **1890 P J 158.**

1577-1578—C P C O. 3, r. 1 (=s. 36, Civ. Pro. Code, 1882)—Application sent by post.—

If any application is made to a Civil Court, it must be made by the applicant in person, or by his duly authorized agent in person, or by his duly appointed pleader in person. This is a standing rule, which cannot be departed from in any case. S. 36 of the Civ Pro. Code, does not recognize the practice of parties, their agents, or their pleaders making applications to Court by post. **Maung Po Kan v. Agun Salaboy, L B R 1872—92, 504.**

1579.—C P C O 3 r 2 r 4 O 41 r 23=(1882 Ss. 36, 37, 39 and 652)—Holding brief for another, legality of—Practice-Oudh Civil Digest Rule VIII.

Held, that an appeal heard and argued by a pleader of this Court to whom the brief had been transferred by another pleader was properly heard and the party so represented should not be allowed to reargue the appeal. Although the transfer is under no formal rule of this High Court, yet being based on a long practice it is valid. (4 O C 303: 22 Bom 654; 9 All 613; 2 Q B D 43 referred to.)

Prag alias Nanhu v. The Deputy Commissioner of Bahraich as Manager, Court of Wards Payagpur Estate. 9 O C 65.

1580-C P C O 3 r.1, s.36, O 4, r.1 =(1882 Ss.36,48) Plaint—Presentation to proper officer-Presentation by proper person-Plaint ordered to be registered after limitation—Effect of such order.

The limitation for filing a suit was to expire on the 18th of February, 1908. The pleader for the plaintiff came to the proper Court on the evening of the 17th of February, after the Judge

C P C (1908) O 3 r 1=(1882 S. 36)

Concld.

and his *munsarim* had both left the Court, and persuaded the suits clerk to receive the plaint.

Held, that the making over of the plaint to the suits clerk was no presentation within the meaning of s. 48 of the Code.

Held, futher that the reaching of the plaint to the *munsarim* on the 18th February through the suits clerk could not be said to be a presentation by the pleader.

Held, also, that the order passed by the Judge on the 19th of February to register the plaint was irrelevant, and could not be considered as having any retrospective effect so as to validate the proceedings of the two previous days.(21 Mad 114 Fol.) **Sri Maharaja Prabhu Narain Singh v. Sarju Misr. 5 Ind Cas 330.**

C P C O 3 r. 2 S. 37 of 1882.

Notes—This rule corresponds to section 37 of the C P C Code of 1882 with some omissions and alterations. Clause (a) has been made wider and comprehensive than the corresponding clause of the old Code, by omission of the word "*general*" which preceded the words "power of attorney, " and of the sentence "*from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance application or act is made or done*, " which occurred with old section. On account of the above omissions the scope of the present clause (a) has become more comprehensive,as the present clause (a) authorizes any person holding a simple power of attorney to make appearance and application in Court and hence the clause (b) of the old section in which there was specific mention of certificated mookteare, has been omitted, as unnecessary.

(1) General (1581-1594).
(2) Miscellaneous (1595-1597).

See Cases under.

(1) Legal Practioner's Act s. 32. **14 Cal 556.**

(2) Summons, Service of Ss. 37. 38, 417, 432, (1859, [illegible] 17 Cl 2.)

C P C (1908) O 3 r 2= (1882. S. 37)

—Contd.

(1) GENERAL.

1581.—C P C O 3 r 2 and s. 85 (=old ss. 37, 432).

S.37 Civ Pro Code 1882 is not superseded by s. 432 which does not prevent the institution of a suit through a recognised agent other than the one appointed under s. 432 (10 Cal 136 Ref). **His Highness the Maharaja of Jummu And Kashmir v. Chaubhatta, 165 P R 1889.**

Notes:—Ref 41 P R 1902.

1582.—C P C O 3 r 2 of 1908=S. 37 of 1882 —Ground for dismissing suit.

Where a lower Appellate Court threw out a case on the ground that the plaint had not been filed by a recognized agent within the meaning of s. 17 Act VIII of 1859, though that point had been disposed of by the Court of first instance,—*Held* that the case should not have been thrown out on such a technical objection not affecting the merits of the case. **Mannoo Dossee v. Ishan Chunder Bonnerjea. [illegible] W R 245.**

Notes:—Ref 5 C L R 484.

1583.—C P C O 3 r 2=(S. 37)—Persons holding powers of attorney—Power of attorney whether should be in writing.—**See Chhayemannessa Bibi v. Kazi Basirar Rahman. (1910) 5 Ind Cas 632= 11 C L J at 285.**

1584.—C P C O 3 r 2 (a)=S.37 of 1882 S.578,1.

A general power-of attorney in the form prescribed in the High Court Circular orders is necessary to enable a person to appear as the recognized agent of a party. A powar of attorney for a particular case only is not sufficient. **Charles Palmer v. Sorabji. 1886, P, J; 63.**

1585.—C P C O 3 r 2 (a)=S. 37-Recognized agent-Am-mukhtar appointed by a party residing within the jurisdiction of the Court in which the suit or appeal is pending—Validity of the appointment of a pleader by such am-mukhtar—Necessity for written authority.

A being engaged in litigation in a Court within the local limits of whose jurisdiction he resided appointed B, as his *am-mukhter*. B instructed C; a duly qualified pleader, to appear on A's behalf in the said Court. C Was not allowed to argue.

C P C (1908) O 3 r 2=(1882, S. 37) --Contd.

(1) General—*Contd.*

The appeal on the ground that his appointment was void, having been made by a person who was not a recognised agent within the meaning of Section 37 Civil Procedure Code and the case was dismissed in default. A applied for re-hearing and stated that he had verbally authorized B to appoint a pleader. This application was dismissed. On appeal to the Chief Court.

Held, (i) that C's appointment by B, was valid and (ii) that a written authority was not necessary for B's appointment as a special agent by A under the last clause of Section 37 of the Code. **Karam Chand v. Ude Singh.**

134 P R 1890.

1586.—C P C O **3** r 21 (a) of 1908=S. 37 of 1882—Mooktear.

A mere mooktear, unless specially authorized is not the recognized agent of the judgment-debtor on whom notice can be rightly served within the meaning of the Civil Procedure Code. **Kristo Chunder Goopto v Fuzul Ali Khan.** **17 W R 389.**

1887.—C P C O **3** r **2**= [1882 s. 37] Persons carrying on trade or business—Not resident meaning of.

The words "not resident" in s. 37 of the Code signify a person who is not at the time when some act is done by his agent present, within the jurisdiction of the Court. **Damoder Das v. Inayet Hussain.** **2 A L J 626= A W N 1905, 221=28 All 135**

1588.—C P C O 3 r 2 O 21 r 2=[1882 ss, 37, 258]—Adjustment of decree certified by general attorney of decree-holder within jurisdiction.

An application under s. 258 C P C to certify an adjustment of a decree made out of Court although an application to the Court to take a step in aid of execution of the decree is not an application made in accordance with law if made by the general attorney of the decree-holder at a time when the decree-holder himself is residing within the jurisdiction of the Court executing the decree. (23 All 499 referred to I All 510 distinguished.) **Kasumri v Beni Prasad** **26 All 19=1903 A W N 172.**

1589.O P C O 3 r 2 of 1908=1882 S.37–Recognized agent Gomastah.

C P C (1908) O 3 r 2=(1882 S. 37) -Contd.

(1) General—*Contd.*

A recognized agent under cl **2** s. 17 Act VIII of 1859 cannot prosecute or defend a suit in his own name. A gomastah of a firm ceases to be a recognized agent under cl 2 s. 17 Act VIII of 1859 when the business of the firm ceased before the institution of the suit. **Mokha Harakraj Joshi v Biseswar Doss.** **5 B L R Ap 11 13 W R 344.**

1590.—C P C O 3 r 2 of 1908=1882 S. **37**—Filing and verification of plaint.

Held that an agent of a party residing within the jurisdiction of the Court not being an authorized agent as contemplated by cl 1 s.17 Act VIII of 1859 was not competent to appear as plaintiff on behalf of his principal and to file and verify the plaint as required by s. **27** of that enactment **Thornhill v. Taylor.** **1 Agra 115.**

1591—C P C O 3 r **2**; s. 99=(1882 ss. 37 and 578)—Authority of agent to file a suit—Punjab Chief Court Rules and orders framed under the section—Recognised agents—Parties not residing within jurisdiction.

A defendant is entitled to question the authority of an agent to file a suit on behalf of his principals.

A defect of this kind cannot be cured, as a [illegible] irregularity under S. 578 of the Code.

An agent carrying on business at Lyallpur, in the name of the partners of a firm resident in England, was held not to be a recognised agent, under the Rules and Orders made under S. 37 partly because it was not really he, but Karachi agents, who carried on the trade and business of the plaintiffs, and partly because there were other agents, authorised in matter of filing suits.

It is impossible to say that "agenst expressly authorised," referred to in clause (e) of the rule applicable to the Punjab, necessarily [illegible] agent actually present in the locality where the contracts are made or carried out. (19 *Cal* 678 Ref. A. W. N. (1899), 55; A. W. N. (1891), 152 Ref.) **Fateh Din v Ralli.** **109 P R 1907.**

1592—*C.* P. C. O. 3 r.2 of 1908=1882 S. 37. Present action of plaint–Munim of firm–Partner.

The munim of a firm is not, for the purpose of presenting a plaint, the recognized agent (under s. 17 of the Civil Procedure Code) of a partner

C P C (1908) O 3 r 2=(1882 S. 37) -*Contd.*

(1) General—*Contd.*

who is present within the jurisdiction. The munim and such partner should join in presenting the plaint or appointing a pleader. The partner's not so joining is not a ground on which an Appellate Court should reverse the decree of a lower Court, unless the irregularity affects the merits of the case or the jurisdiction of the Court **Bisandas valad Magniram v Lakhmichand Kisanchand.** 6 Bom H C R 150.

1593—C. P. C. O. 3 r. 2=(1882 S, 37)-"Reside" meaning of—Power of Attorney given by Zemindar during absence for Delhi Durbar—Zemindar non-resident—Suit filed by agent—Propriety of Vakil's authorily.

"Reside" is an ambiguous and elastic expression and has to be interpreted with the object and character of the provision in which it occurs. The object or purpose of S. 37, C. P. C., being to provide for appearance being made and acts being done on behalf of suitors in courts within the jurisdiction of which they are not, at the time, present, a lilberal construction should be placed upon the term "non-resident" occurring in the said section. Where therefore, the plaintiff the Zemindar of Ettiapuram left Ettiapuram, his permanent residence, for Delhi to attend the Durbar, and before leaving, gave a power of attorney to a certain person to institute and conduct suits in his absence, and the agent instituted a suit against the defendants for rent due, but omitted to file with the plaint the power of attorney which he was bound to do under Rule 23 of the High Court Rules, and the District Munsif returned the plaint for the power of attorney being filed in accordance with the said rule and the plaint was represented with the power of attorney, but after the Zemindar had returned from the Durbar, (the Zemindar being absent in all for about two months):—*Held*, (1) that the Zemindar must be treated as "non-resident" within the meaning of S. 37. C. P. C.: (2) that the plaint must be treated as properly presented by the agent within the meaning of that section; (3) that the production of the power of attorney though after the Zemindr's return would not affect the presentation of the plaint when he was away: and (4) that the vakil who had been retained when the plaint was presented was perfectly competent to file the power when he did it. **Zemindar of Ettiapuram v Subba Reddy.** 14 M L J 223

1594—C. P. C. O. 3 r. 2 of 1908=S. 37 of 1882-Munim of firm being wound up.

C P C (1908) O 3 r 2 =1882 S. 37) -*Contd*

(1) General—*Concld*

The munim of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognized agent of the owner of such firm within the meaning of s. 17, cl. 2 of the Civil Procedure Code, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up. **Tukaji Maharaj Halkar v Pitambardas Naranji, 9 Bom H C R 427=P J (1883) 83.**

Notes:—P J (1883) 83. Ap. 12 Bom 569. Not Fol: 7 C W N 538; 11. Ap: 16 Mad 148 F B. Fol. 10 Bom 105; 26 Bom 538 Ref: 20 Bom 158; 290; 22 Bom 213; 6 Bom L R 1049; 1043; 27 Bom 452.

(2) MISCELLANCOUS.

1595—C. P. C. O. 3 r. 2; O. 6 rr. 14, 15; s.99 =(1882 Ss. 37, 51, 578)—Conditions for suing by agent—Absence of principal from jurisdiction—Objections first raised in second appeal-Maintinablility.

Held that the defect in the signature in the plaint or the absence of signature, where it appears that the suit was in fact filed with the knowledge, and by the authority, of the plaintiff named therein dose not make the plaint void, and that the defect may be waived by the dafendant and, having regard to S. 578 of the Code, is not a ground for interference in second appeal.

Held, further, that such objections must be raised in the original proceedings. (8 Bur. L R. 103, 1 L. B. R. 191. 6 B. H. C. 159, 3 L. B. R. 41, 22 All 55, Ref; 15 W R 245, 12 Bom 69, Foll) **Tha Zan v Tha Dun. 4 L B R 284.**

1596—O P C O 3 r 2 of 1908=S. 37 of 1882 P, residing within the jurisdiction of the lower Appellate Court, though not in that of the Court of first instance, was apparently with the assent of the other side, represented in both Courts and in the High Court by S, holding a general power of attorney from her. In appeal in the execution proceedings the lower Appellate Court held that S could not represent her there. *Held*, that he could not be prevented from executing as agent the decree which he obtained as agent.

Parvatibai v Vinayak Pandurang.
P J (1887) 119=12 Bom 68.

C P C (1908) O 3 r 2=(1882, S. 37 -Concld.

(2) Miscellaneous—Concld.

1597—C P C O 3 r 2 (1908)=S. 37 of (1882)

The appointment by Government of a Political Agent to manage the estates of a Chief does not enable him to sue on the Chief's behalf in Courts in British territory. **Venkatrav Raje Ghorpade v Madhavrav Ramchandra. P J (1886) 144=11 Bom 53.**

Notes.—Ref: 5 C L J 71.

—O 3 r 2—See C P C O 3 r 1 Case. No 1579. **9 O C 65.**

C P C O 3 r 3=S. 38 of 1882.

Notes—This rule corresponds with section 38 of the C P Code, 1882 with this modification that the words "*to a suit or appeal*" after the word *party* have been omitted ; and the word "*the*" has been added before the word *party* in the last sentence.

1598.—C P C O 3 r 3 of 1908=S. 38 of 1882. Ss. 38 and 35=(1859, s.17 and s. 115)—Application by representatives for execution of decree–Authority to appear.

Held that, where one of several representatives of a deceased judgment creditor applies for the execution of a decree, the general powers-of-attoney contemplated by s. 17, cl 1, of Act VIII of 1859 are not necessary, but it is sufficient if the applicant is authorized under s. 115 to act for the other representatives. **Ambaram Harivalabhdas v Himat Sing Kalianji. 2 Bom H C R 109; 2nd Ed 103.**

1599-1600–C P C O 3, r [illegible] (=1882, s.38=1877, s.38=1859, s.17).-Recognised agent—Presentation of plaint without power of attorney—Acceptance and retention by Court—Limitation.

The plaintiff filed his suit before period of limitation in the proper Court. The plaint was presented by his daughter-in-law without a power of attorney who stated that plaintiff was lying extremely ill and as the period of limitation was expiring asked her to present the plaint. The Court on the same day directed the plaint to be kept in office and that the plaintiff should be produced in person. After the expiry of the period of limitation the plaintiff was brought to Court in a *doolie* and he appointed his nephew, his Mukhtar for conducting the suit. *Held* that a written authority was not necessary in favour of the daughter-in-law, acting as recognised agent of the plaintiff under proviso to s. 17. Act VIII of 1859 added by Punjab Government, Notification No 1325, dated 26th Sept 1866 and the Court having accepted and retained the plaint it was filed in time. **Jodh Singh v Wassawa Singh. 9 P R 1878.**

C P C O 3 r 4=S 39, of 1882

Notes—The rule corresponds to section 39 of the C P Code, 1882, with several additions, alterations and omissions, as will appear on a comparison of the two. In clause (1), the last sentence commencing from the words "*and shall be signed &c &c*" has been added. Several additions and alterations have also been made in sub-rule (2). Some alterations of language have also been made in sub-rule (3). The explanation attached to section 39 of the old, Act, has been omitted.

C P C O 3 r 4=S. 39 of C P C (1882).

See Cases under:—

(1) Advocate.
(2) Pleader.
(3) Attorney & client.
(4) Legal Practitioners.

C P C O 3 r 4:—See C P C O 3 r 1. Case No 1579. **9 O C 65.**

C P C O 3 r 5.

Notes:-This rule corresponds to s. 40 of the C P Code,1882,with some modifications.The word"*any*" has been added in the beginning ; and the words "*relative to a suit or appeal*" which occurred in the old section, have been omitted.

C P C O 4 r 1=S 41 of 1882

Notes—This rule correspons with section 41 of the C P Code, 1882. No material change has been made in this rule. The words "*in rule*" have been substituted for the words "in *section* 37," in sub-rule (1) : and the word "*certified*" has been substituted for the words "*duly attested*" in sub-rule [2].

—C P C O 4 r 1—**See** C P C O 3 r 1. Case No 1580. **5 Ind Cas 330.**

—C P C O 4 r 1—**See** C P C (1908) S. 26. Case No (106) **3 M L T 63.**

—O 4 r 1—See C P C (1908) S. [illegible] Case No (107) **29 Mad 239.**

C P C (1908) O 5 r 3=S 66 of 1882

Notes—This rule corresponds with section 66 of the C P Code of 1882. The only change made in this rule is the substitution of the word *where* for the word "if."

1601-1603-C P O O 5 rr 3,4 of(1908)=1882 ss. 66 and 67=(1859, s. 42) Order for personal appearance—Hearing ex-parte.

An order may be made for an *ex-parte* hearing on proof of service of summons issued under s. 42, Act VIII of 1859. **Kistodhone Dutt [illegible] Nilmoney Singh.** **Cor 3**

1604—O P O 5 r 3, O 9 rr 4, 9, 12 (=ss 66, 99, 103, 107, Civ Pro Code 1877)—Dismissal for default—Fresh suit.

Where a suit was dismissed because the plaintiff was not present, nor had he produced his witnesses or accounts but the pleader for the plaintiff [illegible] present and there was nothing on the record to show whether the defendant [illegible] present or not, *held* that [illegible] fresh suit for the same relief was not barred by s. 103 Civ Pro Code, 1877. **Hira Lal v Bhawani.** **A W N 1881, 141.**

1605—C P C O 5, rr 3, 4, O 2 r 21 (=ss. 66, 67, 136, Civ Pro Code 1882)—Party to suit—Personal appearance—Production of documents—Appeal.

A court cannot pass an order under [illegible] 66 of the Civ Pro Code, 1882, for the personal appearance of a party to a suit, in contravention of the provisions of s. 67, cl [b]. Such [illegible] order is appealable under cl 3 of s 588 of the Code. S. 136 of the Civ Pro Code refers only to cases in which [illegible] party is called upon to produce documents, and it gives the Court no authority to insist upon the production of documents by the party in person. **Krishna Ram v Gobind Prasad.** **A W N 1895, 143.**

C P C O 5 r 4=S. 67 of 1882.

Notes:—This section corresponds to section 67 of the O P Code, 1882, with this modification that the words,"*or steamer communication or other established public conveyance*", have been added after the word "railway" in cl (b).

—O 5 r 4—See C P C O [illegible] r 3. Case No 1605. **A W N 1895, 143.**

C P C O 5 r 5,

—O 5 r 5—See C P C O 9 r 7 Case No 1738. **32 Bom 534.**

C P C (1908) O 5 r 5-*Concld.*

C P C O 5 r 5-When summons duly served. See C P C O 9 r 6. Case No 1727. **32 Bom 534.**

C P C O 5 r 6=S 69 of 1882

Notes—This section corresponds to section 69 of the C P Code, 1882, with [illegible] alterations and omissions. After the word "business," the words "*of the Court*" have been added and para [illegible] of the old section which was to the following effect: "*what shall be deemed sufficient time must be determined with reference to the circumstances of the case,*" has been omitted.

1606—C P C O 5 r 6—Rule of High Court and Supreme court—Bombay. **10 Bom L R 301=32 Bom 534.**

1607—C P C O 5 r 6 of 1908=1882 [illegible] 69 (1859 s. 45)—Allowance of time for appearing and answering.

Under [illegible] 45 of the Code of Civil Procedure, a defendant in a suit is entitled to "sufficient time to enable him to appear and answer in person or by pleader." What may be "sufficient time" in [illegible] particular case can only be determined by considering the peculiar circumstances of the case. Where the time allowed is manifestly insufficient [illegible] Appellate Court will interfere. **Khadar Bhi [illegible] Rahiman Bhi. 3 M H C 167.**

—O. [illegible] r. 6—When summons duly served.—See C P C O 9 r. 6, Case No. [1727]. **32 Bom 534.**

—O. 5 r. 6—See C P C O 9 r. 7, Case No. 1738. **32 Bom 534.**

—O 5 r 6—Summons duly served but not in due time. **See** C P C O 9 r 6. Case No 1732. **1 L B R 226.**

C P C O 5 r 7=S 70 of 1882

Notes—This rule corresponds to section 70 of the C P Code, 1882, with this modification, that the words "*containing evidence relating to the merits of the plaintiff's case*" which occurred in the old section after the word "power," have been omitted.

C P C O 5 r 8=S 71 of 1882

Notes—This rule corresponds with section 71 of the C P Code, 1882, with [illegible] verbal changes. The word "also" has been added after the word "shall" and the word "all" has been substituted for the word " the " before the word " witnesses ".

C P C (1908) O 5 r 9=S 72 of 1882.

Notes—This rule corresponds to section 72 of the C P C 1882, with some modifications. The word 'where' has been substituted for the word "if" in the beginning; and the words "unless the court otherwise directs" have been inserted after the words "summons shall" in sub rule (1).

C P.C O 5 r 10=1882 S 73

See (1) Parties-Adding parties to suits.

(2) Summons

(3) Summons service of.

8 A L J 791.

(4) Process, service.

C P C O 5 r 11=s 74 of 1882

Notes:—This rule corresponds to the 1st para of s. 74 of the C P Code 1882, with this modification that the word "save as otherwise prescribed" have been added in the beginning; the word "*where*" has been substituted for the word "*when*;" and the proviso to that section which contained provisions relating to the mode of service of summons upon partners, has been omitted. The reason for the omission is the addition of a separate Order in the present Code relating to suits by or against partners, in which provisions have been made for service of summonses upon partners. See Order XXX, r 3.

C P C (1908) O 5 **rr 11** and 12 O 9 **rr 13** and 14, O 32 **rr 3** (1), 4 (2)—See Parties to suits.

1608—C P C O 5 rr 11; r 22=(1882 Ss 74, 86)—Summons—Service on defendants, members of partnership firm—Service on manager—"Unless the Court otherwise directs" in s 74 C P C.

In a suit instituted against a partnership firm, all members whereof were non-residents at the place in which the business was carried on, service of summons could not be made according to the privision of s 80 of Act XIV of 1882, on the refusal of the manager of the firm to accept service, by affixing a copy of the summons, on the outer door of the house in which the business was located. S. 80 contemplates that the persons sought to be served should be residing at the house.

C P C (1908) O 5 r 11=(1882 S. 74) —Concld.

But service so effected was properly made in accordance with S. 74 of the Act, which contemplates service on the person having management of the business, "unless the Court otherwise directs." These words do not imply, that in such a case the peon must go back to the Court and secure an order from it, expressly authorising service in one of the ways mentioned in the proviso to S. 74. **Akhoy Kumar Saha v Nagendra Lal Chowdhury 13 C W N 490=1 Ind Cas 118.**

1609-C P C O 5 rr 11, 13 (1908)=Ss. 74 and 76—Effect on those sections of s 443 of code of civil procedure—Service of summons on minors.

Ss. 74 and 76 of the code of Civil procedure are controlled by s 443 of the said code.

Jatindra Mohon Poddar v Srinath Roy 26 Cal 267.

C P C O 5 r 11

See C P C O 5 r 17. Case No 1611.

13 C W N 490.

O 5 rr 12–25=[1882 Ss 75–89]

See cases under:—

(1) Process service.

(2) Summons service of.

C P C O 5 r 13=S. 76 of 1882

Notes—This rule corresponds to section 76 of the C P Code, 1882, with this modification only that the words "*summons is issued*" have been substituted for the words "summons issues."

O 5 r 13 (1908)=S 76 (1882)

See cases under:

[1] Process service of

[2] Summons, service of.

[3] C P C O 5 r 12. Case No 1610.

28 Cal 590.

C P C O 5 rr 14=S 77 of 1882

Notes—This rule corresponds to section 77 of the C P Code of 1882, with slight modifications. The word "*where*" has been added in the beginning, and the words "if the" which stood before the word "service" in the old section have been omitted.

C P C O 5 r 14 (1908)=S 77 [1882]

See Cases under:

[1] Process service of.

[2] Summons, service of.

C P C (1908) O 5 r 15=S. 78 of 1882

Notes—This rule corresponds to section 78 of the C P Code 1882, with slight modifications. The word "*where*" has been substituted for the word "*if*" in the beginning of the rule, and the word "*if*" which followed the word "*and*" in the old section has been omitted.

-O 5 r 15 (1908)=S 78 (1882)

See Cases under:—

(1) Process, service of.
(2) Summons, service of.

C P C O 5 r 16=S 80 of 1882

Notes—This rule corresponds to section 80 of the C P Code, 1882 with some important additions and alterations. The first important change made in this rule is the addition of the words "*after using all due and reasonable diligence*." The above additions have been made in accordance with the principles laid down in 26 Cal. 101; 2 C W.N 574; 19 Cal. 201; 24 All 303; 21 Mad, 419 and 324; 21 Bom 223; 30 Bom. 623 and 5 C L J 12n. The second important change is the addition of the words "*or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or works for gain*," and the third important change is the addition of the words "*and the name and address of the person if any by whom the house was identified and in whose presence the copy was affixed.*

-O 5 r 16 (1908)=S 79 of 1882

See Cases under—

(1) Process, service of.
(2) Summons, service of.

-O 5 r 17 [1908]=S 80 1882

See Cases under:—

(1) Process, service of
(2) Summons, service of.

1610—1612—C P C O 5 r 17 (=1882 s. 80=1877 s.80=1859 s.55), Practice—Writ of summons, service of.—

S. 80 of the Code is intended for cases in which the writ should be affixed in the way required by that section after a proper attemp has been made to find the defendant. An affidavit in support of service of a writ of summons under s 80 of the Civ Pro Code, should show that proper efforts have been made to find out when and where the defendant is likely to be found.

Cohen v Nursing Dass
Auddy L B R 1872—1892, 641.

C P C (1908) O.5 r.17=(1882 S.80)-*Concld*

1613—C P C O 5 r 17=(1882 S 80) Service of summons—Practice.—

Where there is merely a statement that the respondent cannot be found, but it does not appear that any effort was made to find him, the serving officer is not entitled to affix a copy of the summons on the outer door of the house in which the respondent ordinarily resided as provided by s. 80 of the Civil Procedure Code 1882.

Sakharam v. Padmakar 8 Bom L R 757 =30 Bom 623.

1614—C P C O 5 r 17 O 9 r 13=(1882 Ss 80, 108)—Application to set aside a decree passed exparte—Irregular service of summons:

Where a serving officer finds a defendant to be away temporarily from home and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service **Sakina v. Gawri Sahai 1902 A W N 68=24 All 302.**

Notes:—Ref: 30 Bom 623=8 Bom L R 757; 29 Mad 324.

1615—C P C O 5 rr 17, 19, 20 (1)=(ss. 80, 82) -Substituted service summons—S. 82 of the Code directs that before taking any further action under that section the Judge should himself examine the serving officer on oath. Before a Judge directs substituted service under s. 82, he should first satisfy himself that the defendant has been keeping out the way for the purpose of avoiding the service. This implies that the defendant is aware that the writ is out against him.

Moran v The Simla Bank Corporation Bank Ltd. A W N 35 (1886).

—O 5 r 17—Effect of setting aside on exparte decree.

See C P C O 9 r 13. Case No 1907.
21 Mad 324.

C P C O 5 r 18=S. 81 of 1882.

Notes—This rule corresponds with section 81 of the C P Code of 1882 with some alterations and additions. The following sentence after the words "was served" —" *and the name and the address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons*," has been added.

—O 5 r 18 (1908)=S 81 (1882).

See Cases under:—

(1) Process, service of.
(2) summons, service of.

—O 5 r 18—See C P C (1908 S. 107 Case No. (1250) (1885) A W N 323.

-O 5 rr 19, 20 (1) of (1908)=S. 42 (1882).

See Cases under.

(1) Process, service of.
(2) Summons, service of.

-O 5 r 20 (2) of (1908)=S 82 (1882).

See Cases under.

(1) Process service of.
(2) Summons service of.

1616—C P C O 5 r 20 (2)=Ss 82, 73, 75—Substituted service-Temporary absence no ground by itself:—

Whenever it may be practicable, the service of summons shall be made by delivering (or tendering a copy to the defendant in person, and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered. Temporary absence by itself will not justify a resort to this mode of service and if there is a reason for believing that the defendant's absence is not temporary, an attempt should be made for service under the other sections of the Code. (21 Mad 419 fol: 21 Mad 325 dist:) **Abraham Pillai v. Donald Smith. 29 Mad 324. 8 Bom L R 757.**

-O 5 r 20 (3) of (1908)=S 84 (1882).

See Cases under:—

(1) Process, service of.
(2) Summons, service of.

-O 5 rr 21, 23 (1908)=S. 85 (1882).

See Cases under:—

(1) Process, service of.
(3) Summons, service of.

C P C O 5 r 22=S. 86 of 1882.

Notes—This rule corresponds with the first para of section 86 of the C P Code, 1882, with some verbal changes. The second para of the old section has been omitted from this rule and the provisions contained in that para, have been inserted in rule 23.

See Cases under:—

(1) Process, service of.
(2) Summons, service of.

—O 5 r 22. See C P C O 5 r 17. Case No 1611. **13 C W N 490**

C P C O 5 r 24=S. 88 of 1882.

Notes.-This rule briefly lays down the provisions contained in the first para of s. 87 and also the provisions contained in section 88 of the C.P. C 1882. The provisions of both the above sections have been embodied in this rule in a concise form as will appear on comparison. The second para of section 87 of the old Code has been omitted from this rule and embodied in rule 29.

C P C O 5 r 24,29 (1908)=S 87 (1882)

See Cases under:—

(1) Process, service of.
(2) Summons, service of.

1617—O 5 r 24, 29 of 1908=1882 S. 87—Prisoners' Testimony Act (XV of 1869), ss 15 and 19—Act XV of 1869, s. 16—Signature of jailor—Judicial notice.—

The Court will take judicial notice of the jailor under s. 16, Act XV of 1869, Prisoners' Testimony Act. **Tamor Sing v Kalidas Roy 4 B L R O C 51.**

Notes:—Fol: 22 Bom 612. Ref 30 Cal 489; 22 All 270.

1618—C P C O 5 r 25=(1882 s.89)-Service of summons on defendant residing out of British India.

Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof of service to show that the summons was posted but, there must be some evidence of its having been received by the defendant. **Fakir-uddin v Ghapur ud-din. 1901 A W N 1=23 All 99.**

1619-C P C O 5 r 25, O 21 r 2 =(1882 S. 29)—Transfer of Property Act (IV of 1882), S. 89, 104—C P C Act (XIV of 1882), secs. 244, 258—Preliminary mortgage-decree — Payment before decree absolute—Adjustment of decree—Limitation Act (XV of 1877) sch. II Art, 173A.

A Court to which an application is made under sec 89 of the Transfer of Property Act has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the application and to make the order absolute for the realisation of that amount only.

Sec. 258 Civil Procedure Code, does not apply to an application made under sec. 89 of the Transfer of property Act, that section not having been made applicable by any rule issued by the High Court under sec. 104 of the Transfer of Property Act; consequently Art. 173 A of sch. II of the Limitation Act does not apply to the case of any payment made before a decree absolute is made.

Any question that arises as to an order absolute for sale is not a question relating to the execution of the decree.

Hatem Ali Khundkar v Abdul Gaffurkhan. [illegible] C W N 102.

Notes:—Ref: 12 C W N 282=7 C L J 581 Diss 30 All 248=(1908) W N 103=5 A L J 272. Dist: 9 C L J 358.

C P C O 5 r 26,

1620-1622-C P C O 5 r 26—Combined decree legality of C P C S 230-Limitation for the decree under S 90. A combined decree under Ss 88 and 90 is in contravention of the provisions of the Transfer of Property Act. The decree for the balance due after the sale of of the mortgaged properties is governed by S 230 C P C and will be barred if execution is sought after 12 years from the commencement of the proceedings in execution. (27 Cal 285 Expl. 25 Cal 580 referred to. 25 All. 641 diss from.) **Chandicharan Roy Chowdhry v Ambika Charan Dutt** 31 Cal 792.

Notes—Ref 32 Mad 534.

C P C O 5 r 28=s.468 of 1882

Notes—This rule corresponds with the first para of section 468 of the C P Code of 1882. the second para has been omitted from this rule and embodied in Rule 29 (1).

—O 5 r 28 O XLVII r 1 (1) See Ex-parte decree.

C P C O 5 r 29 1908=S 89 of 1882.

See cases under:—

(1) Process service of.
(2) Summons service of

C P C 1908 O 6 r 1

Notes—"The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits. In this country outside the Presidency towns, the pleadings are seldom artistically drawn. They are neither concise, nor precise, but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy. The sole object of pleadings is thus frequently defeated; the issue is enlarged: the trial is delayed and much unnecessary expense incurred by the parties, who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall, when applicable, be used for all pleadings, and when they are not applicable, forms of the like character shall be used. The rules prescribed will not prevent the pleader from exercising his discretion; for the amount of detail must necessarily vary with the nature of each suit it is, however, made clear, that they must be particularly sufficient to apprise the Court and the other party of the exact nature of the questions to be tried.

The Committee have also given a party, who considers that his opponent's pleading, does not give him the information to which he is entitled, the right to apply for further particulars so as to enable him to know what case he has to meet at the trial.

They have however endeavoured to modify the rigour of the rules by providing in accordance with section 55 of the Indian Evidence Act, (*Vide* O. VIII, r. 5), that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it" *See the Report of the Special Committee.*

C P C (1908) Or 6 r 2.

Notes—This rule is new and it follows the English order XIX r 4.

C P C O 6 r 2 1908=1882 s 114.

See Cases under:—

(1) Written statement.
(2) Set off.
(3) Small cause court, Presidency Towns—Jurisdiction—Set off.

C P C 1908 Or 6 r 3.

Notes—This rule is new and follows the English order XIX r 5

C P C 1908 or 6 r 4

Notes—This rule is new and follows the English order XIX r 6

C P C 1908 Or 6 r 5.

Notes-This rule is new and it follows the English order 19 r 7.

C P C 1908 Or 6 r 6

Notes-This rule is new & it follows the English order 19, r 14

C P C 1908 Or 6 r 7

Notes--This rule is new, it follows the English order 19 r 16.

See Cases under:—
Decree—Form of decree.

C P C (1908) Or. 6 r. 9.

Notes:—This rule is new, it follows the English Order XIX, r. 21.

C P C (1908) Or 6 r. 10.

Notes:—This rule is new and it follows the English Order XIX, r. 24.

C P C (1908) Or 6 r 11.

Notes:—This rule is new, and it follows English Order XIX, r. 25.

C P C 1908 Or 6 r 12.

Notes: –This rule is new and it follows the English order XIX r 26.

C P P (1908) O 6 r 13

Notes:—This rule is new and it follow the English order 28 r 1.

O 6 rr 14, 15 (1908)=(1882) s. 115.

See Cases under :—
(1) Written statement.
(2) Set off.
(3) Small Cause Court, Presidency Town Jurisdiction-Set off.
(4) Plaint

C P C (1908) O 6 rr 14, 15 (1)=s.51 (1882).

See Cases under:—Plaint.

1623.—C P C O V., rr 14 and 15—Signing and verification of plaint. **See** **48 P R 1896.**

— O 6 r 14—See O 14 r 1. Case No 2037 **11 C W N 871.**

— O 6 r 14—See O P C O 3 r 2. Case No 1595. **4 L B R 284.**

C P C (1908) O 6 r 15.

Notes.—The provisions contained in sections 51, 52, and 115 of the C P Code of 1882 have been summarised in the above two rules. To meet the cases on points on which there is a conflict of authority, several alterations and additions have been introduced in these rules.

See Cases under:—

(1) C P C O 14 r 1. Case No. 2037. **11 C W N 871.**
(2) O P C O 6 r 14. Case No. 1623. **48 P R 1896.**
(3) C P C O 3 r 2. Case No. 1595. **4 L B R 284.**

C P C (1908) O 6 r 15 (2), (3)=S 52 (1882)

See cases under :—
Plaint.

C P C (1908) O 6 rr 16, 17=1882 ss. 53 & 116.

Notes:—These two rules briefly lay down the provisions contained in sections 53 and 116 of the C P C Code of 1882, relating to the amendment of the pleadings. The language and the wordings of these two rules are quite different from those of the above two sections ; but they are intended to take the place of those two sections.

The most important change made in the present Code is the omission of cl. (b) of section 53 of the old Code, which provided that a plaint can be returned for amendment *only at or before the first hearing* of the suit Under the present Code the Court may at any stage of the proceedings allow either party to alter or amend his pleadings.

The Court under section 153 of the present Code may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit.

1. **Amendment of pleadings in appeal 1624-1630**
2. **Power of Conrt to amend pleadings at any time before judgment 1631—1635**
3. **Amendment of pleadings, alteration of nature of suit. 1636.**
4. **Miscellaneous 1637**

See also cases under : –

Planit—Amendment of Plaint.

C P C (1908) 0 6 r 17-Amendment of pleadings when may be allowed—See Public Demands Recovery Act. (Bengal Act [illegible] of 1895 [illegible] 15)

14 C L J 83

(1.) Amendment of pleadings in appeal.

1624—1626.—C P C O 6, r 17—Defence of limitation—General observations about amendment of plaint :—

The plaintiffs filed [illegible] suit for dissolution of an alleged partnership and accounts. It was found by the Court of first instance that they had advanced Rs 400, to the defendants ; but it dismissed the suit on the ground that no partnership had been created and the suit as framed would not lie. The plaintiffs appealed contending that the partnership had been created and the suit was in order. When the appeal came on for hearing the plaintiffs prayed for leave to amend by adding [illegible] prayer for the recovery of Rs. 400. This amendment was allowed and the claim decreed. The defendants appealed on the ground that the amendment was wrongly allowed, especially as at its date the claim was time-barred; —*Held*, that the amendment was rightly allowed. The defence of limitation was, in the particular circumstances, a defence to which the defendants were never fairly entitled and the allowance of the amendment only withdrew from them an advantage which they ought never to have received. *Per Batchelor* J. Under O 6 r 17 of the Civil Procedure Code, 1908, it is clear that at any stage of the proceedings all amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments in plaints should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit

had become barred by limitation, the amendment must be refused : to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of [illegible] good defence to the claim. The ultimate test, therefore, remains the same. Can the amendment be allowed with injustice to the other side, or, can it not? *Per Beaman J*—Amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a advantage for which he cannot be adequately compensated by costs. There [illegible] two simple tests to ascertain whether a given case is within the principle. First, could the party seeking to amend obtain the same quantity of relief without the amendments ? If not, then, it follows necessarily that the proposed amendment places the other party at a disadvantage; it allows his opponent to obtain more from him than he would have been able to obtain but for the amendment. Second, in those circumstances can the party thus placed at a disadvantage be compensated for it by costs? If not, then the amendment ought not, unless the case is so peculiar as to be taken out of the scope of the rule, to be allowed. **Kisandas Rupchand [illegible] Rachappa Vithoba Shilvant.**

11 Bom L [illegible] 1042=33 Bom 644.

1627.—C P C O VI, r 17, O XIV, r 5.

Discretion and power to amend pleadings and issues-Interference in revison-Plaint-Amendment of Plaint. **See [illegible] Ind Cas 267=51 P L R 1911.**

1628-1629-C P C O 6 r 17-Shebait, suit by, for recovery of-Advances made by him-Dispossession by-Co-shebait-Limitation Act (XV of 1877), Sch, 11 Arts. 36, 120—Parties—Plaint—Amendment of—Appellate Court, power of, to allow amendment—Civil Procedure Code, (Act XIV of 188[illegible]) Ss. 53, 582.

J, the grand-father of the Plaintiffs and of some of the Defendants, and great grand-father of the remaining Defendants, established certain idols and dedicated certain properties for their worship, etc, and prescribed a certain order in which his descendants, were to become shebaits. When the office of shebait devolved upon plaintiff's father B, he was kept out of possession by defendant P of [illegible] portion of the debutter estate, and in [illegible] suit by B against P and certain other

CPC (1908) O. 6 r 17=(1882, S.53)-*Contd*

(1) Amendment of pleadings in appeal-*Contd.*

persons, B having died during the pendency of the suit, it was decreed declaring the properties in dispute to be debutter and that B was entitled to shebait. B had to advance money out of his own estate to meet with expenses of the debutter estate. The plaintiffs brought the present suit, as heirs and legal representatives of B, for recovery of the debutter estate. The plaint stated that as it was not certain who amongst the Dafendants was entitled to be shebait, all of them were made parties, but Court was not asked to determine who was entitled to be shebait. *Held*-That the plaintiffs as creditors of the debutter estate were not entitled to any relief against defendant P personally simply on the ground of his having realised money from the debutter estate.

That the suit against P personally was barred under s. 36 Sch. 11 of the Limitation Act.

That [illegible] to the suit against the debutter estate, the period of Limitation did not begin to run from the time when the advances were made but from the time when plaintiff's father B died and Art. 120 of Sch. 11 of the Limitation Act applied to the case.

That the suit was not maintainable, inasmuch [illegible] it was not stated in the plaint who the person was that was entitled to represent the estate as shebait and the plaintiffs had not asked for the determination of the question as to who was the shebait for the time being.

That an Appellate Court has power under s. 582 read with s. 53 of the Civil Procedure Code, to allow an amendment of the plaint. (9 Cal 695; 22 Cal 692; 20 Mad 467 ref. to.)

Where the object of [illegible] amendment of a plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit.

Rajah Peary Mohan v Narendra Krishna.
5 C W N 273.

1630—C P C O. 6 r 17—Court Fee—Decree—Memorandum of appeal, amendment of—Civil Procedure Code, Ss. 53, 582—Court Fees Act. VII of 1890—

Generally, an Appellate Court cannot pass a decree for a larger amount than that claimed in Memorandum of Appeal, unless, before the judgment is pronounced, an amendment of the Memorandum of Appeal is allowed, and the additional

C P C (1908) O.6 r 17=(1882, S.53)-*Contd.*

(1) Amendment of pleadings in appeal-*Concld*

Court Fee paid in. **Percival v Collector of Chitagong**
30 Cal 516.

(2) Power of Court to amend pleadings at any time before judgment.

1631—C P C O 6, r 17, O 7 r 11. O 6 r 18 (= Ss. 53, 54 Civ. Pro. Code, 1882)—Receiving plaints

The receiving of plaints is not a merely mechanical operation. The Civ. Pro. Code, (ss. 53 and 54) requires that the Court shall consider the plaint before action is taken upon it, and this is the more necessary in rural parts, because there litigants largely rely on the assistance of the Courts in the conduct of their suit.

Nga Shwe Win v Nga Chan, E.
L B R 1872-1892, 365.

Notes.—Ref: L B R 1893-1900, 583.

1632-1635—C P C O 6 r 17; O 7 r 11=(1882 s. 53)-Plaint—Misjoinder of causes of action—Misjoinder discovered after framing of issues-Amendment of plaint.

One B N sued as adopted son of H deceased, to recover the estate left by H. With him was joined as plaintiff a daughter of H, who prayed that if the adoption were not proved, she might recover the estate for herself and her two sisters. Objection was taken that the suit was bad for misjoinder but notwithstanding this, issues were framed. Subsequently the court ordered the plaintiffs to amend the plaint having elected which of them should continue the suit. *Held*, that whilst there was undoubtedly [illegible] mis-joinder of parties and of causes of action the order passed by the Court was erroneous, inasmuch as after the framing of issues the plaint can be amended by the Court itself. **Baju Nath v Chowrao.**
1903 A W N 240.

C P C O VI r 17 and O VII r 11, O XXI r 17 s. 141—See Execution of decree—Application for execution and powers of Court.

C P C O VI r 17—Court's power to grant amendment of plaint. **11 Ind Cas 827.**

C P C O VI r 17—Powers of amendment under the new Code. **See 11 Ind Cas 856.**

(3) Amendment of—pleadings—Alteration of nature of suit.

1636—O VI r 17—Plaint—Addition of further relief—Amendment—Whether allowable.
10 M L T 557.

(4) Miscellaneous.

1637 -O VI r 17 O VII r 11—See—Plaint—Rejection of plaint.

O 6 r 17—O 7 r 11=C P C (1882) s. 53 (f).

See Jurisdiction—Causes of jurisdiction—Cause of Action. **41 P R 1887.**

O 6 r 17; O 7 r 11=C P C S. 53 1882.

See Multifariousness. **79 P R 1899.**

1638—1639—O VI rr 17, 18; O VII r 11 **See**—Plaint—Rejection of. **126 P R 1881.**

1640—O VI r 17, O VII r 11. **See** Succession Act 1865 ss. 332, 190.

1641—O VI r 17 O VII r 11—**See** Contract Act 1872 s. 28.

1642—O VI r 17 and O VII r 11—Kabuliat—In respect of what Kabuliat suit lies. **See** **12 O C 140 B=2 Ind Cas 920.**

—O VI r 17 O VII r 11—**See** Injunction.

O 6 r 17.

See (1) C P C (1908) O 1 r 10 cl.(1) Case No. (1511). **33 Cal 657.**

(2) C P C O 1 r 17 Case No. (1462). **34 Cal 662.**

(3) C P C O 1 r 1. Case No. (1461) **9 P W R 1908.**

(4) C P C (1908) s. 107. Case No. (1250). **(1885) A W N 323.**

O 6 r 18 (1908), O 7 r 11 1882) s. 54.

See Cases under:—

(1) Limitation Act 1877 s. 4.
(2) Plaint—Rejection of plaint.
(3) Plaint—Return of plaint.
(4) Plaint—Amendment of plaint.
(5) Court Fees Act S. 28.

1643-1644—O 6 r 18 O 7 r 11=(s.54, Civ.Pro. Code. 1882)—S. 28, Act VII of 1870 (Court Fees)-Insufficiently stamped plaint—Limitation.—

Under s. 54 (b), Civ. Pro. Code, 1882, read with s. 28, Act VII of 1870, the Court has a discretionary power to fix a time within which the requisite Court-fee is to be furnished. If the deficiency in stamp is supplied within the time fixed by the Court, the suit will be reckoned as instituted on the day the plaint was originally presented. (19 Cal 780, 27 Cal 814, Fol). The Court may also enlarge the time granted for supplying the deficient Court-fee, **Rajkishori Koer v Madan Mohan Singh.** **31 Cal 75.**

Notes:—Fol. 123 P R 1907=82 P W R 1907=3 M L T 63; Ref: [illegible] O O 241.

See also cases under:—Court Fees Act s. 28.

—C P C O VII, rr. 1, 2, 4, 5, 6—**See** Mortgage—Redemption.

C P C (1908) O. [illegible] r. 18=(1882) S. 54.

—O. 6 r 18—Plaint insufficiently stamped Power of Court to extend limitation—**See** C P C O. 7, r 11, Case No. 1660. **23 All 428.**

—O. 6, r. 18—Suit barred by any law—**See** C P C O. 7 r 11. **34 Cal 20.**

—O. 6 r 18—Plaint insufficiently stamped —**See** C P C O 7 r 11, Case No. 1656. **28 Mad 498.**

—O. 6 r 18—Plaint insufficiently stamped —**See** C P C O 7, r 11, Case No. 1653. **9 C W N 844.**

—O 6 r 18—See C P C O. 6 r. 17, Case No. 1631, **L B R 1872, 365.**

—O 6 r 18—See C P C (1908) S. 26, Case No. (106). **3 M L T 63.**

C P C (1908) Or 7, r 1 S. 50 of 1882.

See Cases under:—Plaint.

Notes:—This rule corresponds to section 50 of the C P Code of 1882 with some additions and alterations. In the first para, the word "shall" has been substituted for the word "must".

Clauses [d], [f] and [i] are new, there were no similar provisions in the old section.

Clause [e] corresponds with clause [d] of the old section with some alterations. Clause [d] of the old section ran as follows: " *A plain and concise statement of the circumstances constituting the cause of action, and where and when it arose*".

Clause [g] corresponds with cl. [e] of the old section with some verbal alterations. The words "*a demand of*" which occurred in the old section have been omitted.

Clause [h] corresponds with cl. (f) of the old section, with this modification that the word "where" has been substituted for the word "*if*".

C P C (1908) O 7 r 1, 2, 4, 5, 6= (1882) S 50.

See Cases under:—
Plaint.

—O. 7 r. 1—Notice of suit to state the cause of action—**See** C P C (1908) S. 80, Case No. [1081]. **[illegible] Bom L [illegible] 132.**

1645—C P C O. VII, rr. 1, 2, 4, 5, 6—Representation to proper Court after long delay—Non-averment of particulars required by s. 50 — Endorsement of Court as to dates of receipt and return—Sufficient compliance—Limitation Act, 1908, s. 14. **9 Ind Cas 157.**

1646—C P C O 7 rr. 1, 2, 4, 5, 6, of [1908]= [1882] S. 50.—

In the Mofussil [illegible] Hindu claiming under a will is not bound by any law to obtain probate of the will in the District Court before he can sue in respect of the property which he claims.
Bhagvansang Bharaji v. Bechardas Harjivandas, **P [illegible] (1881), 139=6 Bom 73.**

Notes:—Ref: 19 Bom 832.

1647—C P C O 7, rr 1, 2, 4, 5, 6 (=s. 50 Civ. Pro. Code, 1882).—

Quære:—Where a plaintiff can be allowed to take advantage of any express ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint, having regard to the terms of s. 50, Civ. Pro. Code, 1882.
Benode Behary Mookerjee v. Raj Narain Mitter, **30 Cal 699=7 C W N 651.**

Notes:—Ref: 14 C W N 128.

C P C (1908) Or 7 r 2.

Notes:—This rule corresponds to paras. 2 and 3 of section 50 of the C P Code of 1882, with verbal changes only.

—O 7 [illegible] 2—Notice of suit to state the cause of action—**See** C P C (1908) S 80.Case No.(1081). **6 Bom L R 132.**

See cases under:—Plaint.

C P C Or 7 r 3

Notes:—This rule is new. There was no such provision in the old Code. It is similar to Order XX, r. 9 of this Code which directs that [illegible] decree for recovery of immoveable property should contain boundaries.

C P C (1908) Or 7 r 4

Notes:—This rule corresponds with para 4 of section 50 of the C P Code of 1882 with some verbal changes only. The word "*where*" has been substituted for the word "*when*" in the beginning, and the word "*shall*" has been substituted for the word "*should*" after the word "*plaint*". The three illustrations attached to para. 4 of the old section have been omitted.

—O 7 r 4—Notice of suit to state the cause of action—**See** C P C (1908) S.80,Case No.(1081). **6 Bom L R 132.**

See "Plaint".

C P C Or 7 r 5

Notes:—This rule corresponds to para. 5 of section 50 of the C P Code of 1882, with this modification that the word "*shall*" has been substituted for the word "*must*" after the word "*plaint*" and the illustration attached to the para. has been omitted.

—O 7 r 5—Notice of suit to state the cause of action.—**See** C P C (1908) S.80,Case No.(1081) **6 Bom L [illegible] 132.**

See "Plaint".

C P C Or 7 r 6.

Notes:—This rule corresponds with the last para. of section 50 of the C P Code of 1882, with some change of language only.

See Cases under "Plaint".

—O 7 r 6—Notice of suit to state the cause of action—**See** C P C (1908) S.80,Case No.(1081). **6 Bom L R 132.**

1648—C P C O. 7, r. 6 (S. 50)—Exemption from limitation — Statement of ground Minor plaintiff or plaintiffs:—

The decision in (1903) 31 Cal 195; s. c. 8 C W N 168 did not lay down that under S. 50 of the Civil Procedure Code (Act XIV of 1882), [illegible] plaintiff could not take advantage of any ground of exemption not set up in the plaint. Nor did it lay down that in no circumstances should the plaintiff who has omitted to set up such a ground be allowed to amend his plaint. When the plaintiff or all the plaintiffs is [illegible] minor or are minors, it is not usual for them to plead exemption from the law of limitation as prescribed by that section.—**Gangadhara Sarkar v. Khuja Abdul Ajij Nawab Salimulla Bahadur.** **14 C W N 128.**

C P C Or 7, r 7.

Notes:—This rule is new. It follows English Or. XX, r. 6 and has adopted the principles laid down in several cases.

C P C (1908) O 7 r 7-*Concld.*

1649-1652—C P C O.VII, r. 7—Suit for cancellation of sale-deed by vendor and for recovery of properties—Decree for unpaid purchase-money —Jurisdiction.

In a suit for the cancellation of a sale-deed and for recovery of properties comprised in the sale on the ground of failure of consideration, the Court is justified, on the principle of O. VII, r. 7 of the C P C (Act V of 1908), in giving the plaintiff vendor a decree for the amount of the purchase-money that, it finds, was not paid to him. **Mahalinga Pathan v. Tirumalai Pillai,** **[illegible] M L T 483=8 Ind Cas 64.**

C P C Or. 7, r. 8.

Notes:—This rule is new. It has been borrowed from English Order XX, r. 7 and it should be read with rule 3 of Order 1.

C P C (1908) Or. 7 r 9=S. 53 of 1882.

Notes:—This rule corresponds to section 58 of the C P Code of 1882, with some modifications of a verbal character. In sub-rule (1) the word "*list*" has been substituted for the word " *memorandum*", and the words " *of the relief claimed* " have been substituted for the words " of the relief or remedy required".

In sub-rule (2), the word "*where*" has been substituted for the word " if ".

The last para of section 58 of the old Code has been omitted and inserted under Order IV, as rule (2) with some alterations of a verbal character.

C P C (1908) O. 7 r 10=S. 57 of 1882.

Notes:—This section corresponds to section 57 of the C P Code of 1882, with several important changes. Clauses [*a*], [*b*] and [*c*] of the old section have been omitted, and the words " *in which the suit should have been instituted* ", have been added to sub-rule (1), inasmuch as those words are sufficient to include the cases covered by clauses (*a*), (*b*) and (*c*) of the old section.

The words "*the Court in which the suit should have been instituted*", mean that where the suit

C P C (1908) 0. 7 r. 10=(1882, S. 57) -*Concld.*

ought to have been instituted in some other Court in accordance with the provisions of sections 15, 16, 17, 18, 19 and 20 of this Code. Thus the present rule embodies in a more convenient and concise form the provisions contained in clauses (*a*), (*b*) and (*c*) of section 57 of the old Code.

The words " *at any stage of the suit* " have been added to sub-rule (1). The addition is an important one and it has been made in accordance with the principle laid down in [illegible] Cal 834, where it has been held that the provisions of this section might be put into force at any stage of the suit. Sub-rule (2) exactly corresponds with the last para of section 57 of the old Code.

The provisions of this section are imperative, and might be put into force at any stage of the suit. An order dismissing a suit under this section is appealable.—8 Cal 834.

—O. VII, r. 10 of 1908=1882 S. 57 (1859, S. 30: Act XXIII of 1861, s. 3).

See Cases under Plaint—Return of Plaint.

—O. VII, r. 10—C P C S. 57 (1882)—See Burma Lower Courts Act S. 31(2),Case No.(3). **3 L B R 120.**

C P C O. VII, r. 10—Return of plaint—Old stamp—Credit to be given by proper Court—**See** Court Fees Act, 1870, s. 30.

C P C O. VII, r. 10—See Appellate Court, Powers of Appellate Court.

C P C O. 7 r. 11=Ss. 53, 54 (1882).

Notes:—This rule embodies the provisions of cl. (*a*) of section 53 and the provisions of section 54 of the C P Code of 1882, with some additions and alterations.

Clause (*a*) of this rule corresponds with the latter part of clause (*a*) of section 53 of the old Code.

Clause (*b*) corresponds with clause (*a*) of s. 54 of the old Code with some verbal changes.

Clause (*c*) corresponds to clause (*b*) of s. 54 of the old Code with some verbal changes.

Clause (*d*) corresponds with clause (*c*) of section 54 of the old Code, with this important alteration, that the words " *by any law* " have

C P C (1908) O 7 r 11=(1882 Ss. 53, 54)-*Contd.*

been substituted for the words "any positive rule of law": which occurred in the old section. The word "*any law*" would include codified as well as case law. But the words "*any positive rule of law*" meant only any codified law.

Clause *(d)* of section 54 of the Code of 1882, has been omitted. The reason for the omission seems to be, that there is no express provision in the present Code for return of pleadings for amendment (see rules 16 and 17 of Order **VI**).

1 Plaint insufficiently stamped 1653—1659.

2 Plaint insufficiently stamped-Power of court to extend limitation 1660—1668

3 Relief claimed is undervalued 1669—1671

4 Suit barred by any law 1672—1674

5 At what stage the plaint can be rejected 1675—1677

See Cases under:—

(1) Limitation Act 1877 s. 4.

(2) Plaint—*Amendment of Plaint.*

(3) Plaint—Rejection of Plaint.

(4) Plaint—Return of Plaint.

(5) Court Fees Act S. 28.

(6) C. P. C. (1908) O 6 r. 17.

(1) Plaint insufficiently stamped.

1653—C P C O 7. r 11 [S 54]—Presentation of Plaint improperly stamped—Time given beyond the limitation period-Compliance—Suit not barred:—Court-Fees Act Ss. 6, 28.

19 M L J 840=32 Mad 306 (F B).

1653A—C P C O 7 r 11, O 6 r 18=(1882 Sec. 54)—Plaint insufficiently stamped—Deficit paid a day after the time fixed, but within the period of limitation, effect of.

C P C (1908) O. 7 r. 11=(1882, Ss. 53, 54)-*Contd.*

(1) Plaint insufficiently stamped—*Contd.*

Where a plaintiff supplied the deficit Court-fees one day after the time allowed by the Court but before the suit was barred by limitation, the suit might be regarded as having been filed on the day on which the deficit Court-fee was paid and as on that date the suit was in time, the Court ought to have tried the case on the merits and not rejected it under Sec. 54 C P C (27 Cal 376 Ref to.). **Harakumar Pal v Safatulla.**

2 C L J 70=9 C W N 844.

Notes:—Ref: 5 C L J 270 ; 34 Cal 305.

1654—C P C O 7 r 11 S. 3=(1877) S. 4—Limitation—Presentation of plaint insufficiently stamped—Deficiency made good after the expiry of limitation period but within the time fixed by Court—Civil Procedure Code (1882), s. 54 (b).

When a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation, and time is given by the Court under section 54 (b) of the Code of Civil Procedure to make good the deficiency, the suit is not barred by limitation if the deficiency is supplied within the time fixed by the Court but after the limitation period has expired. **Gavaranga Sahu v Patro.** **(F B) 6 M L T 129.**

1655—C P C O 7 r 11—Sch II, Arts 15, 17—Suit to obtain possession of wife—Court Fees Act—Declaration that a marriage took place and possession of wife prayed for—Stamped paid under Arts, 17 and 15—Legality of—Placing a suit under two articles.

A party cannot place his suit under two different articles of the Schedule of the Court Fees Act saying that he pays Rs. 10 for a declaratory decree and Rs. 5 for possession of his wife. Such a computation is utterly unknown under the Court Fees Act and opposed to the practice of the Court. **Amirul Hossain v Khairunnissa.** **28 Cal 567.**

1656—C P C O 7 r 11 O 6 r 18=(1882 S.54) Plaint—Stamp paid by order of court—Retrospective.

Where stamp duty is paid by order of court subsequent to the presentation of plaint, such payment relates back to the date of presentation and the plaint must be treated as a proper one as from that date in the absence of any evidence to show that there was fraud in putting in the

C P C (1908) O 7 r 11=(1882, Ss. 53, 54)-Contd.

(1) Plaint insufficiently stamped—*Concld.* plaint without stamp (2 All 341 ref to.).
Alayakamal v Subbraya Goundan.
15 M L J 219=28 Mad 493.

1657—C P C O 7 r 11=O 6 r 18=C P C S. 54—Alternative prayers in Plaint—Plaint insufficiently stamped—Court cannot reject without first requiring proper stamp to be paid.

The plaintiff sued to redeem a kanom (mortgage) of 1858, and alleged in his plaint that the defendants were setting up a renewal of 1874, which was not however, binding on the plaintiff. He paid court-fees on the amount of the mortgage admitted by him and added an alternative prayer that if the Court should find the renewal of 1874 to be valid, he might be allowed to redeem on the footing of that renewal. The District Munsif decreed the suit, but the District Judge on appeal found that the renewal of 1874 was binding on the plaintiff and dismissed the suit, inasmuch as he had not paid court-fees on the amount of that renewed kanom, but only upon the kanom of 1850, which was for a less sum.

Held: that the dismissal of the suit was improper and that the proper course for the Judge was that provided for by S. 54, Civil Procedure Code, viz., to require the plaintiff to pay the additional stamp necessary to cover the larger amount and in default to reject the suit.
Subrahmania Pattar v Valiya Nayar.
[illegible] M L J 187.

1658—C P C O 7, r 11; O 6, r 18=S. 54—Order dismissing appeal for improper stamp.

Order of a District Judge dismissing the appeal as improperly stamped is appealable.
Vithal v Balkrishn 1858 P J 339.

1659—C P C O 7 r 11 (1908)=(1882)—S. 28—Civil Procedure Code, S. 54—Suit filed on last day of limitation on an insufficient court fee—Limitation:

Where by a mistake of the plaintiff and not of the Court or of any officer of the Court, a plaint was filed upon an insufficient court fee and this was not discovered until after the period of limitation for the suit had expired, it was *held* that the suit was barred. (13 All 57; 23 All 428; 23 All 129 and A W N 1904, 133 foll.; 24 Mad 331 diss from.) **Ram Tahal Singh v Dubri Rai.**
3 A L J 838. 1906 A W N 21; 28 All 310.

C P C (1908) O 7 r 11=(1882, Ss 53, 54)-Contd.

(2) Plaint insufficiently stamped-Power of court to extend limitation.

1660—C P C O 7 r 11; O 6 r 18=(1882 S.54) Court Fees Act (VII of 1870) Ss. 7, cl (5), 6 (c), 28—Power to extend time for paying deficiency in court fee:

In a suit for pre-emption the plaintiff undervalued the claim but the officer of the Court reported that the valuation was correct. Later on the defendant objected that the relief had been undervalued. The Court found that it should have been stamped at the stamp for Rs. 123-12-0. *Held*, that S. 54 and not S. 28 applied. The Court had no power to extend the time for making up the deficiency in court fee beyond the expiry of the period prescribed by the law of limitation and the plaint should be rejected.
Muhammad Ahmad v Muhammad Sirag-ud-din. 23 All 423.

Notes:—Fol: 27 All 411=2 A L J 55=(1905) W N 12; 28 All 310=3 A L J 838=(1906) W N 21, Ref: 11 C W N 38 F B=4 C L J 421=1 M L T 355; 34 Cal 30 F B; 4 A L J 636 F B; 29 All 749 F B. Fol: (1904) W N 133.

1661—C P C O 7, r 11 O 6 r 18 s. 104, O. 43 r 1=(1882 Ss.54,588) Order admitting amended plaint after time—Appeal.

No appeal lies against an order admitting an amended plaint after the time fixed. **Sheik Ali Hussain v Fazal Hussain Khan.**
4 Ind Cas 492.

1662-C P C O 7 r 11=O 6 r 18 of 1908=1882 [illegible] 54—Court cannot extend limitation prescribed.

When a Court fixes a time under cl (a) or cl (b) of s. 54 of Act XIV of 1882, it must be a time within limitation. Section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. **Jainti Prasad v Bachu Singh. 15 All 65, 13 W N 29.**

Notes.—Fol: 30 Mad 319; 24 All 218. Dist: 24 Mad 331; 27 All 197; (1904) W N 224; 133: 17 All 288; 1 A L J 641. Diss: 32 Mad 305 F B. Not Fol: 27 Bom 330. Ref: 29 All 749 F [illegible]; 18 All 206; 20 All 11; 23 All 423; 6 A L J 905 F B; 19 M L J 340 F B; 25 Mad 380; 4 A L J 636 F B

C P C (1908) O 7 r 11=(1882, Ss. 53, 54)-*Contd.*

(2) Plaint insufficiently stamped-Power of court to extend limitation—*Contd.*

1663—C P C—O 7 r 11=O 6 r 18 of 1908=1882 s. 54.—cls (a) & (b)—s. 582 C P C,

Clauses (a) and (b) of s.54 are inapplicable to civil appellate jurisdiction of the High Court.

Bal Karan Rai v Gobind Nath Tiwari. 12 All 129.

Notes—Disap: W N (1907) 253; 29 All 749 F B. Diss: 15 Mad [illegible]; (1904) W N 234. Not Fol: 19 Cal 780; 27 Bom 330. Diss: 23 Bom 486. Dist: 27 All 197; 20 Cal 41; 26 Cal 925; 4 M L J 183 F B: 1 A L J 641. Ref: 19 Cal 747; 28 Cal 277; 427; 20 Mad 319; [illegible] Mad 331; 13 All 320; 16 All 65; 123; 16 All 308 F B; 18 All 206; 25 Mad 380; 32 Mad 305 F B; 19 M L J 340 F B. Rel: 13 C W N 815. Fol: 28 All 310=3 A L J 838=(1906) W N [illegible] Disc: [illegible] A L J 636 F B.

1664.-C P C O 7 r 11; O 6 r 18=(1882 s.54)—Court-fee—Order of Court to make up deficiency of—Suit, when may be said to be properly instituted—Res judicata.

Where [illegible] plaint has been filed in time, the fact that it was not duly stamped when the period of limitation expired, does not render it time-barred, since it must be regarded as having been presented on the day upon which it was filed. In the explanation to s. 4, Indian Limitation Act 1877, that "a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer," the Legislature used the expression "plaint" without reference to the law [illegible] to Court-fee. *Held*, also that where [illegible] plaint has under s. 54 cl (d), Civil Procedure Code, been returned for amendment within a time fixed by the Court the Court can extend the time both before and after it has expired.

A decision may be *res judicata* between the parties on the same side, the mere circumstance of persons having been formally arrayed on the same side in a suit being immaterial. If a matter has been actively in issue between them, and if as to that matter they had [illegible] active controversy against each other, they will be stopped by the decision in that matter. **Aziz un-nissa v Mukim-un-nissa. 4 O C 108, Referred to in 8 O C 24.**

1665.—C P C O 7 r 11; O 6 r 18=(1882) S. 54—Plaint on insufficient stamp—Rejection of plaint—Dismissal of suit.

C P C (1908) O. 7 r. 11= 1882, Ss.53, 54)-*Contd.*

(2) Plaint insufficiently stamped-Power of court to extend limitation—*Contd.*

A plaint was filed in a Court on the 22nd January 1886 and a point as to what [illegible] the proper fee was not decided till the date fixed for the first hearing, the 23rd February 1886, when it was ordered that three rupees more be paid into Court by 24th February 1886. [illegible] the money was not paid, the suit was dismissed under s. 157 Civil Procedure Code. *Held*, that although the plaint was registered it is obvious that the question of the stamp should have been previously decided, that the case was in its initial stage on the 23rd February 1886, and therefore the Court had no option save to proceed under s. 54 Civil Procedure Code. **Bahadur Singh. Oudh S C 118.**

1666.—C P C O 7 r 11; O 6 r 18=S. 54-Court Fees Act 1870, *S.* 12 cl 1.

The Subordinate Judge rejected a portion of the claim [illegible] it was not valued and no stamp duty was paid [illegible] it without allowing plaintiff an opportunity under S. 54 of the Civil Procedure Code of supplying the omission. *Held* that his decision [illegible] not final under cl. 1 of S. 12 of Act VII of 1870, and that the deficient stamp duty having been paid on first appeal, plaintiff was entitled to have that portion of the claim heard.

Bhaishankar v. Motiram. 1888 P J 120.

1667.—C P C O 7 r 11, O 6 r 18=S. 54 of 1882—Call for additional stamp—Bonafide mistake as to time granted-Delay.

Where the Vakil *bonafide* believed that the time granted for the payment of additional stamp duty was fifteen days whereas it was only [illegible] fortnight and paid the money [illegible] the 30th April instead of on the 29th.

Held, that the Court had power to extend the time originally allowed and that in the circumstances of the case, the time should have been extended and the delay excused. (19 All 240. referred to.) **Subramaniam v. Ramaswamy. 9 M L J 348.**

1668.—C P C (1908) O 7 r 11=C P C [1882 S. 54]—Court Fees Act, S. 28—Plaint-Insufficient stamp—Extension of time—Further extension after expiry of time originally granted—Power of Court to extend time *ex post facto*—Civil Procedure Code Act V of 1908. S. 148.

The Court can extend time *ex post facto*, that is it is competent to the Court to extend the time

C P C (1908) O. 7 r. 11=(1882, Ss.53, 54 -Contd.

(2) Plaint insufficiently stamped-Power of court to extend limitation —*Concld.*

to put in the insufficient Court fee on a plaint even after the expiry of the time originally granted. (16 Bom 263; 17 Cal 1; Ref. 34 Cal 20(F B); 4 C L J 431; 11 C W N 38; 1 M L T 355; 20 Cal 41; 27 Cal 376; 9 C W N 844; 2 C L J 70 Dist.).

Dewan Amir Husain Khan v Nanhak Chand 6 Ind Cas 424=14 C W N 882=12 C L J 62.

(3) Relief claimed is undervalued.

1669.—C P C O 7 r 11=S. 54 of 1882.

Suit undervalued—Power to grant time for payment of deficiency in court-fee—Limitation. A suit comprising a claim for recovery of immoveable property on title and in the alternative a claim for pre-emption was filed, so far as the latter claim was concerned on the last day of limitation. Owing to a miscalculation of the Government revenue payable on the property claimed the plaint was understamped and the mistake was not discovered until long after the period of limitation had expired. *Held*, that it not being the duty of the Court, in which the plaint was presented, or of the office of that court to check the plaintiff's calculation, S. 28 of the Court Fees Act did not apply and as S. 54 C P C did not allow the period of limitation being extended, the suit was properly dismissed, the plaintiff being found to have no case on his alleged title. (23 All 433 foll. 15 All 66 and 12 All 143 ref to.).

Jagram v. Chhatarpal. 1904 A W N 133.

1670.—C P C O 7 r 11; O 6 r 18=S. 54—Insufficient stamp—Time to be fixed.

Decree reversed where the Lower Court had rejected a suit as improperly valued, without fixing a time within which plaintiff might correct the valuation. **Raghunath v Gangadhar. 1888 P J 58.**

1671.—C P C O 7 r 11; O 6 r 18=S. 54—Valuation-Construction of plaint—Court Fees Act 1870 S. 7.

The plaintiff prayed for a declaration of his right to manage the village and collect rents from tenants on passing a *kabulayat* and for possession of that right and for the determination and award of profits of the village during attachment, *held* that the suit was one for possession of land and that section 7(b) proviso 1 of Act VII of 1870 applied and that following 10 Bom 610, the appeal against dismissing the suit under section 54 of

C P C (1908) O. 7 r. 11=(1882, Ss.53, 54)-Contd.

(3) Relief claimed is undervalued—*Concld.*

the Code of Civil Procedure for not correcting the valuation was inadmissible. **Narayan v. The Secretary of State for India in Council. 1894 P J [illegible]**

(4) Suit barred by any law.

1672.—C P C O 7 r 11; O 6 r 18=1882 S. 54—Plaint admission, registration and rejection of.

It is competent to a Court to reject a plaint under section 54 clause(b) of the Civil Procedure Code after the plaint has been admitted and duly registered.

A plaint was presented on the 23rd June 1902 insufficiently stamped. The plaintiffs were directed by the Court to pay the deficit Court fees on or before the 5th July, the Court fees were supplied on the 6th July. No prayer was made for extension of time; nor was an order made in that behalf; but the plaint was directed to be admitted and registered. At the final hearing the plaint was rejected upon objection taken by the defendant that the deficit Court fees had not been paid within the time allowed.

Held, that the plaint ought not to have been rejected, but the Court ought to have proceeded with the suit, as if it had been instituted on the date the deficit Court fees were actually paid, dismissing such portion of the claim, if any, as might in this view be barred by limitation.

Padmanand v Anant Lal 4 C L J 421=11 C W N 38=1 M L T 355=34 Cal 20.

Notes:—Ref 34 Cal 305; 5 C L J 270.

1673.—C P C O 7 r 11 S. 80 (1908) =1S. [illegible] 424—Notice by person under whom the plaintiffs claim, insufficiency of—Plaint, rejection of.

A notice given under the provisions of S. 424 by a party who dies before filing the suit will not enure for the benefit of his representatives so as to entitle them to institute a suit without giving fresh notice. S. 424 is imperative and a plaint filed without giving the required notice is to be rejected under S.54 (c) C P C and cannot be cured by a subsequent notice. **Bachchu Singh v The Secretary of State for India. 1903 A W N 13=25 All 187.**

Notes:—Fol 8 C W N 913. Dist 5 C L J 148. Ref; 5 C L J 270; 34 Cal 257; 305; 28 All 600.

C P C (1908 O. 7 r. 11=(1882, Ss. 53, 54)-*Contd.*

(4) Suit barred by any law—*Concld.*

1674—C P C O 7 r, 11, O 6 r 18=(s.54) C P C 1882—Registration of plaint—Rejection.—

The terms of s. 54 C P C are imperative and mandatory. So the registration of the plaint does not prevent its rejection under s. 54 (8 Cal 192 Diss.) **Brahmomyi Dasi v Andisi, 27 Cal 376.**

Notes:—Appr: 34 Cal 20 F B; 4 C L J 431 =11 C W N 38=1 M L T 355.

(5) At what stage the plaint can be rejected.

1675.—C P C O 7 r 11; O 6 r 18=1888 s. 54.

Time granted not to exceed period of limitation for suit. When a court fixes a time under cls (*a*) (*b*) of S. [illegible] of the Code of Civil Procedure it must be a time within limitation and S. 54 does not give a court any power to extend the ordinarily prescribed period of limitation for suits. (15 All 66 foll. 9 Cal 730 ref to.)

Durga Singh v Bisheshar Dayal.

[illegible] A W N 27=24 All 218=27 All 197.

1676.—C P C O VII r 11: O 6 r 18= Civil Procedure Code Act XIV of 1882 Sec 54 cl (c)—Plaint, when may be rejected.

Where the plaintiff sued to establish a mut raiyati right which by a Government order was not granted and also sought for the position of a mustagir and to set aside the executive orders of the Commissioner and the Deputy Commissioner, and the lower Courts rejected the plaint under sec [illegible] of the Civil Procedure Code.

Held—That upon the allegations made in the plaint the suit ought to have been tried and the plaint could not be rejected on the ground of the suit being barred by any positive rule of law. **Nawab singh v Charan Rana. 6 C W N 411.**

1677-1678.—C P C O 7 r 11 (1908)=1882 S. 54—Rejection of plaint—Procedure—Plaint not to be rejected in part.

A Court cannot reject a plaint in part.

Raghubans Puri v Jyotis Swarupa.
1907 A W N 68; 29 All 325.

C P C (1908) O. 7 r. 11=(1882; Ss.53, 54)-*Contd.*

C P C O 7 r 11. O 6 r 18.

See cases under:—

(1) Limitation Act, 1908, s. 3. **27 Cal 814=4 C W N 818.74 P R 1908**

(2) C P C O 6 r 17 Case No 1633. **17 Mad 67.**

(3) C P C O 6 r 17 Case No 1632 **1903 A W N 240.**

(4) C P C O 6 r 17 Case No 1631 **L B [illegible] 1872, 365.**

(5) C P C (1908) S. 26 Case No. (106). **3 M L T 63.**

(6) C P C O 1 r 1 Case No. (1462) **34 Cal 662.**

(7) C P C (1908) O 1 r 1 Case No (1461) **[illegible] P W R 1908.**

(8) C P C (1908) S.107 Case No (1250). **(1885) A W N 323.**

(9) C P C (1108) S. 148 Case No.(1893) **12 C L J 62.**

C P C O 7 r 12=S. 55 of 1882.

Notes—This rule corresponds with section 55 of the C P Code of 1882. The only change made in this rule is the substitution of the word "*where*" for the word "when" in the beginning.

C P C O 7 r 13 of 1908=(1882 S. 56 (1859 S. 36).

—S. 56 (1859 s. 36).

See Appeal—Acts—Act XXVI of 1867. Cases Nos (106, 107). **6 B L R Ap. 11, 12. 7 B L R 663, 664.**

C P C O VII, r 13, O XLIII, r 1—Appeal—Orders. **42 P R 1874.**

C P C O 7 r 14= S 59 of 1882

Notes—This rule exactly corresponds with section 59 of the C P Code 1882. The only change made is the substitution of the word "*where*" for the word "*if*" in the beginning of sub rule (2).
—O VII r 14 of 1908=1882 s. 59. (1859, s. 39.)

See Cases under Production of Documents.

—O 7 r 14—Inspection of documents.
9 Bom L R 1084=32 Bom 152.

C P C (1908) 0 7 r 15

See C P C O 10 r 4. Case No 1983.
6 A L J 340.

C P C 0 7 r 16-S 61 of 1882

Notes—This rule corresponds to section 61 of the C P Code 1882 with some verbal changes only.

C P C 0 7 r 17-S 62 of 1882

Notes—This section corresponds to section [illegible] of the C P Code, 1882, with some additions and alterations in the language.

"On the suggestion of the British Indian Association the word "account" has been substituted for the word "book".—*See the Report of the Select Committee.*'

1679—C P C (1908) O 7 rr 17,18—**Admissibility of document not produced with plaint—Document on which the suit is based—Prejudice by reception at late stage. See** O P C (1908) 8.99 Case No (1209a.).
10 C L J 33= 13 C W N 797.

C P C 0 7 r 18=S. 63 of 1882 (1859, S. 39, para 4.

See Production of Documents.
8 Bom 377, [illegible] Mad 373; [illegible] Bom 971.

C P C 0 8 rr 1-2=S 110 of 1882

Notes—This rule corresponds to section 110 of the old Code. Material alterations have been made in this rule, [illegible] will appear from [illegible] comparison with the old section 110, which is reproduced here: *"The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements, and place them on the record."*

Under this rule it is not obligatory upon the defendant to put in a written statement; but if required by the Court he is bound to put in his written statement at or before first hearing, or within such time as the Court may permit.

—O [illegible] r 1—When summons duly served. **See** O P C O 9 r 6 Case No 1737. **32 Bom 534.**

—O 8 r 1—**See** O P C O 9 r 7 Case No 1738
32 Bom 534.

C P C 0 8 rr 1-10; 0 6 rr 2-17 (1908) =(1882) Ss 110-116.

See Cases under.

1 Written Statement
2 Set off
3 Small Cause Court, Presidency Towns—Jurisdiction—Set off.

C P C 0 8 r 2

Notes—This rule is new—It has been borrowed from English O 19 r 15.

C P C 0 8 r 3

Notes—This rule is new—It has been borrowed from English O 19 r 17.

C P C 0 8 r 4

Notes—This rule is new—It has been borrowed from English O 19 r 19.

C P C 0 8 r 5

Notes—This rule is new—It has been borrowed from English O 19 r 18.

O P C O 8, r 5—When defendants deemed to have admitted notice.
[illegible] Ind Cas 470.

C P C 0 8 r 6=S. 111

Notes—Sub-rule (1) of this rule corresponds with the first para of section 111 of the C P Code of 1882, with some additions and alterations. The word "*where*" has been substituted for the word "if" in the beginning; and the sentence "*not exceeding the pecuniary limits of the jurisdiction of the Court*", has been inserted after the word plaintiff.

The second para of section 111 of the old Act has been omitted [illegible] unnecessary on account of the addition of the sentence above referred to.

Sub-rule (2) of this rule corresponds to para. 3 of section 111 of the C P Code of 1882, with change of some words, without any alteration in the meaning.

Sub-rule (3) is new.

-0 8 r 6 (1908)=(1882) s. 111.

See Cases under:—

1 Written statement
[illegible] Set off
3 Small Cause Court, Presidency Towns—Jurisdiction—Set off

1680-1681—C P C O 8 r 6=(1882 S. 111)-Set off-Scope of section.

S. 111 does not take away any right of set off which parties would have independently of its provisions. **Rash Behary v Bhovani Churn. 34 Cal 97.**

Notes—Ref: 10 Bom L R 1141; 33 Bom 469.

1682-C P C O 8 r 6=(1882 S.111)-Ills (d)-Set-off,

Where the default in a suit for rent claimed a [illegible] off of the amount due to him by the plaintiff under a decree. *Held* that s. 111 is applicable and ills (*d*) covered the case and that the section will cease to be applicable only if the defendant had applied to the same Court for execution of his decree. **Bharat Prasad Sahi v Ramesh-[illegible] Koer. 8 C W N 118=30 Cal 1066.**

Notes—Dist: 11 C W N 215.

1683—C P C O 8, r 6=(1882 s. 111)—Set-off—suit for mortgage decree.

Where the suit was one not for recovery of money but was only for the enforcement of a mortgage security, the right to sue for a personal decree having been barred by limitation when the suit was brought. *Held*, the case did not come under s. 111, C P C and no set—off can be claimed. **Fakir Chandra Dutta v Gisborne Co. 8 C W N 174.**

1684—C P C O 8 r 6=(1882 s. 111)—Set off—Admitted in plaint—Decree for the defendant if plaintiff should fail to prove his claim.

A filed this suit against B to recover Rs.3,427-15-3 alleged to be due on account of business dealinge. He admitted [illegible] debt of Rs. 621-14-3 due by him to B [illegible] a different account. B, on the same day A's suit [illegible] filed, instituted [illegible] suit in the Presidency Small Cause Court to recover the said Rs. 427—14—3.

Held—B should treat the sum of Rs. 621-14-3 [illegible] admitted set off and if Plaintiff failed in his suit, [illegible] would have [illegible] right to ask for judgment for that sum. **Hart v Grosser. 9 C W N 748.**

Notes—Ref: 34 Cal 97.

1685—C P C O 8 r 6=(1882 S. 111),—Set off—"Legally recoverable"—Company—Liquidation—Director—Companies Act (VI of 1882). S. 214.

The words "legally recoverable" in s. 111 of the Civil Procedure Code, 1882, have no reference to the ability of the debtor to pay the demand in full; and [illegible] sum is legally recoverable though in the result the creditor must be satisfied with [illegible] dividend.

In an action by [illegible] Company to recover [illegible] sum fraudulently obtained by the defendants before the liquidation of the Company, one of the defendants claimed to set off against the Company a debt from the Company to him incurred prior to the commencement of the winding up:

Held, that the defendant could set off the debt due to him, though the amounts of the debts were ascertained after the liquidation, as the debts which were sought to be set off one against the other were debts between the same parties, and in the same interest and neither resulted from a dealing with the liquidator.

A director can set off a debt due to him from the Company in an action brought against him by the Company though he cannot set off a debt due to him against a claim made by [illegible] liquidator under s. 214 of the Indian Companies Act. (8 Q B D 179 Dist.) **Ahmedabad Advance S. [illegible] W. Co. v Luxmishanker. 7 Bom L R 246= 30 Bom 173.**

1686—C. P. C. O. 8, r. 6=(1882, S. 111).

Equitable set-off-Right to set-off unascertained damages—Contract—Breach of Contract. **37 Cal 334=6 Ind Cas [illegible]**

1687-1688—C P C O 8 r 6=(1882 S. 111) Damages—Equitable set off.

Relief may be given by way of set off otherwise than under s. 111 of the Code of Civil Procedure which is not exhaustive. Hence when the defendants suffered loss by reason of the negligence of the plaintiff who was commission agent, in abstaining from selling certain goods at the proper time.

Held that the defendants were entitled to claim equitable set off of damages as against the plaintiff's claim for the amount which in the ordinary course the latter would have been entitled to for brokerage, warehouse charges, etc. (15 All 9) referred to. **Nand Ram v Ram Prasad. 1 A L J 529=1904 A W N 193=27 All 145.**

C P C (1908) O 8 r 6=(1882 S. 111-*Contd.*

—O VIII r 6=s. 111 (1859 s. 121).

See (1) Set-off

(2) Small Cause Court, Presidency Towns —Jurisdiction—Set-off. **21 Cal 419.**

(3) Partnership—Rights and liabilities of partners. **53 P R 1898.**

(4) Hindu Law—Joint Family. **5 P L R 1900.**

(5) C P C O 9 r 7 Case No 1738. **32 Bom 534.**

—O 8 r 6—When summons duly served—**See** C P C O 9 r 6 Case No. 1727. **32 Bom 534.**

—O 8 r 6—Reversal or modification of decree on ground, common to all **See** C P C O 41 r 4 Case No 2982 **18 M L J 39,**

C P C O 8 r 7.

Notes—The rule is new. It has been borrowed from English O 20 r 7 and is similar to order VII rule [illegible] of this Code.

C P C O 8 r 9=S. 112 of 1882

Notes-This rule to certain extent corresponds to section 112 of the C P Code, 1882, with several alterations and and omissions.

—O 8 r 9 (1908)=(1882) s. 112.

See Cases under:—

(1) Written statement
(2) Set off
(3) Small Cause Court, Presidency Towns —Jurisdiction—Set off

C P C O 8 r 10=S. 113 of 1882

Notes—This rule corresponds to section 113 of the C P Code, 1882, with some modifications. The word "*where*" has been substituted for the word "*if*" in the beginning; and the words "*may pronounce a judgment*" have been substituted for the words "pass a decree" after the word "Court".

—O 8 r 10—Limitation Act 1908, S. 19. **25 P R 1886.**

—O 8 r 10 (1908)=1882 s 113

See Cases under

(1) Written statement
(2) Set off
(3) Small Cause Court, Presidency Towns —Jurisdiction—set off

—O 8 r 10—See C P C (1908) s. 2 cl 9 Case No. (45) **15 O C 78.**

C P C (1908) O 9 r 1=(1882, S. 96

1689—C P C—O. IX, r. 1, O. XVII, r. 3—Appearance—Advocate appearing and applying for adjournment and then withdrawing on the application for adjournment being refused—Ex parte decree—Application for setting aside—Sufficient reason.

where time was given to the defendant to summon his witnesses but he failed to summon them, whereupon his pleader applied for a postponement of the case and, on his application being refused, withdrew his appearance.

Held that the withdrawal of his appearance by a pleader, who had represented the defendant in this case continuously for over two years, simply because the Court proceeded under O. XVII, r. 3, to decide the suit forthwith, declining to give further time to the defendant would not necessarily render the subsequent proceedings *ex parte.*

In every application for setting aside a decree the petitioner must satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

Palaneappa Chetty v Muthu Chetty. **10 Ind Cas 770.**

—O 9 r 1—See C P C O 9 r 7 Case No 1738 **32 Bom 534.**

—O 9 r 1—When summons duly served **See** C P C O 9 r 6 Case No 1727 **32 Bom 534.**

C P C O 9 r 2=(1882, S. 97)

Notes—This rule corresponds to section 97 of the C. P. Code, 1882, with some additions and alterations: In the first para of this rule, the words "*where on the day so fixed*" have been substituted for the words "if the day so fixed for the defendant to appear and answer" which occurred in the old section. The words "*or postal charges (if any)*," after the words 'Court-fee' have been added.

—O 9 rr 2, 3, 4, O 23 r 1, S 141—Execution of decree **A W N 1889, 204.**

—O 9 r 2 of 1908=1882—ss 97, 98.

See:—Appeal—Default in Appearance. Case No (500). **10 Mad 270.**

1690—C P C—O. 9, r. 2. O. 48, r. 1—Meaning of failure, in O, 9, r. 2—Omission to pay Court, fee.

C P C (1908) O 9 r 2—(1882 S 97)—Contd.

The 'failure' contemplated by r. 2, o. IX, Civ. Pro. Code, is not confined to an entire omission to pay the requisite Court-fee, but also includes an omission to pay that fee within the time which the Court is required to fix for payment under O. XLVIII, r. 1 of the Code. **Sadanand v Nathia.** **7 N L R 114.**

1691—C P C—O. 9 r. 2 of 1908 = 1882 s. 97 (Act XXIII of 1861, s. 5)—Default in depositing allowance for notice to defendant—Dismissal of suit.

Where the Court of first instance ordered a co-defendant to be joined in the suit, but the plaintiff failed to pay the allowance necessary for the purpose of causing a notice to be served on such co-defendant, who accordingly did not appear at the hearing,—*Held* that the proper course for the Court to have adopted was to dismiss the suit under s. 5 of Act XXIII of 1861 *Semble*—The provisions contained in the first portion of s. 5 of Act XXIII of 1861 are imperative **Abas v Ibrahimji.** **5 Bom., H C R A C 119.**

1692—C P C—O 9 r 2 of 1908 = 1882 S. 97—Default in depositing allowance for notice to respondent.

A notice to a respondent having been returned unserved, owing to the omission on the part of the appellant to deposit the requisite talabana in the proper Court, the default under ss. 5 and 6, Act XXIII of 1861, was held to be in no way excused by the fact of its having been committed by an ignorant karpardaz, or man of business, whom appellant chose to employ rather than a vakil. **Pran Chunder Roy v Juggessur Mookerjee.** **11 W R, 417.**

1693-C P C O 9 r 2 = Ss 97, 98-Non-appearance of the Parties.—

A case was struck off the file by the District Munsif for default on appearance of both the parties. *Held* that the order striking off the case was illegal. **Alwar v Seshammal.** **10 Mad 270.**

Notes:—Ref: 5 O L J 260; 34 Cal 235; 18 M L J 51.

1694—C P C O 9 r 2 = S 97-The provisions of s. 97 of the Civil Procedure Code apply as well to a reissued summon for service on the defendant as to an original summons. **Chhaganlal Ishwar Das v Vinayakrao Janardan.** **P J (1898) 249.**

C P C (1908) O 9 r 2 = (1882 S. 97)—Contd.

1695—C P C—O. 9 r. 2 = Ss 97, 99—Dismissal for failure to produce evidence—Remedy.

On the 17th December, 1881, the plaintiffs in this suit informed the Court of first instance that they would produce witnesses in three days and the 20th December was accordingly fixed for the hearing of the suit. On the 20th December the Court dismissed the suit, its order being as follows:—Whereas the plaintiff has not produced any evidence in support of his claim and does not conduct his suit properly I dismiss his claim with costs." On the 14th January, 1882, the plaintiffs applied to have the case restored to file under ss. 97 and 99, Civil Procedure Code. The first Court allowed the application and gave the plaintiffs a decree which was upheld in appeal to the Court of first appeal. In second appeal it was *held* that the order of the Munsif, dated 20th December, was made under s. 155, of Code of Civil Procedure and not under ss. 97 and 99, nor could it be regarded in the nature of a review of Judgment. The plaintiff's only remedy therefore was by way of appeal under s. 540. In restoring the case, the Munsif acted ultra vires and the whole subsequent proceedings are consequently void. **Partab Rai v Ram Kishan.** **3 W N 171.**

1696.—C P C O 9 r 2 = 1882 s 97.

Dismissal of suit for not paying process fees—Course to be adopted Revision.

Held, that when a plaint is returned for amendment the proper course is to give another date for next hearing of the case after the day by which the amended plaint is to be re-filed.

Held also, that s 97 C P C is applicable only to cases in which plaintiff fails to file *Thulbana* for the first hearing.

Held further, that the powers of revision will not generally be exercised when the petitioner has another remedy **Shahabdin v Anjaman** **65 P W R 1908**

1697.—C P C O 9 rr 2 and 4—Suit against minor defendant—Guardian *ad litem*—Service of summons on minor—Not paying process fee for serving guardian—Sufficient cause—Punjab Courts Act XVIII of 1884, S 70 (*a*).

Held, that:—

1. Where a person assigns good and sufficient cause for not doing an act which he is legally bound to do, a Court, arbitrarily rejecting it, fails to exercise a judicial discretion.

C P C (1908) O 9 r 2=(1882,S.97) *Contd.*

So where, on the refusal of both the mother and father of a minor defendant to act as guardian *ad litem*, the Court appoints *Nazir* of the Court to represent the minor, plaintiff cannot be asked to pay process fee for summoning that officer.

2. A guardian *ad litem* is not a defendant in a suit, and the penal provisions of O 9, r 2 of the Code have no application to the case of a failure to pay in process fee for summons to be served on him.

3. A minor should personally be served in all cases.

Quære—Whether the service of summons only on the guardian *ad litem* of a minor is sufficient service for the purposes of the Code. Procedure to be followed in such like cases, pointed out. (14 Cal 204 (215), Ref.) **Gobind Ram v Muhammad Ali, 115 P W R 1911=211 P L R 1911=11 Ind Cas 317.**

C P C O 9 r 3 (1908)=(1882) S 98

Notes-This rule briefly lays down the provisions contained in section 98 of the C. P. Code, 1882, which is reproduced here for the purpose of comparison. "*If on the day fixed for the defendant to appear and answer, or on any other subsequent day to which the hearing of the suit is adjourned, neither party appears, the suit shall be dismissed, unless the Judge, for reasons to be recorded under his hand, otherwise directs.*"

On comparision it would appear that the first part of the old section has been omitted as unnecessary, when read with rule 1 of this Order.

Under the old Code there were conflicting rulings as to whether an order dismissing a suit or appeal for default in appearance was appealable as decree. In (24 Cal. 60; 23 Cal. 115 and 827; 22 Mad. 821 and 21 Mad 157), it was held that the order was not appealable as decree. But in the Full Bench case reported in (30 Cal. 660: 7 C. W N. 486), a contrary view was taken. The above conflicting rulings have been set at rest by the definition of the "decree" given in section 2 of the present Code, which provides that the word "decree" *Shall not include any order of dismissal for default.* Thus it is clear that there is no appeal against any order of dismissal for default under this Code.

C P C (1908) O 9 r 3=(1882 S.98)-*Contd*

See Cases under:—

Appeal—Default in appearance

1698.—C P C O 9 r 3: r 4; S 114 O 47 r 1; r 2=(1882 Ss 98, 99, 623, 624).

Held, that an order dismissing a suit under S. 98, is a "judgment" within the meaning of s 648 C P C and that, where a party omits to avail himself of his proper remedies under S 99 C P C., no application for review can be entertained under S 623, C P C (2 O W N 318, Fol.) **Inder Singh v Ram Singh 33 P R 1909=44 P L R 1909=31 P W R 1909=1 Ind Cas 900.**

1699.—C P C O 9 r 3: O 17 r 2=(1882 Ss 98, 157.)

Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders are absent, the suit should not be dismissed, but the Court, dealing with the claim, should pass an order under S 98 C P C 1882 and then record reasons for any decision it arrives at on the materials before it. **Ramanathan v Karuppayee. 8 Ind Cas 156=8 M L T 450.**

1700.—C P C O 9 r 3 and sch II r 5 (=ss. 98 and 510 of Code of 1882)—Arbitration pending—Power of Court to dismiss suit.—

When a suit is referred to arbitration and is pending before the arbitrators, the Court has no power to dismiss the suit under s 98 of the Act of 1882 (=O 9, r 3), Civ Pro Code, unless an express order superseding the arbitration under s. 510 Civ Pro Code, has been passed. The order of dismissal under s 98 of the Code of 1882 cannot by itself operate as such order. **Imam Din v Jawahari, 10 P R 1899.**

1701.—C P C O 9 r 3 =(1882, S 98).

Decision of a case in the absence of parties—Dismissal in default under s 98 C P C—Previous notice of a hearing. It is illegal to decide a [illegible] in the absence of either party on a date of which the parties had no previous notice. **Lalba Kashti v Kondu Krishna 14 C P L R 134.**

1702.—C P C O 9 r 3 (1908)=s 98 (1882)—Dismissal of suit for default in appearance—Parties to be informed of the place of hearing as well as the date.—

Held, that Courts of Justice when on tour should [illegible] dismiss any suit for default in appearance unless they are satisfied that due notice of the exact date and place of hearing was given to the parties. It is essential for every Judicial Officer to acquaint the parties either by an order in Court given in his presence or by notice containing the date and place of hearing. To post a general notice and programme of the tour at head-quarters is not a sufficient notice within the requirements of the Civil Procedure Code. (7 P R 1898, Rev; 46 P R 1875 cited.) **Nand Lal v Ditraj** **37 P R 1904**

1703.—C P C O 9 r 3 of, 1908—Default in appearance—Inability to attend.—

The affidavit of a party alleging inability to attend from illness is not enough to satisfy the Court; but for this purpose there must be a medical certificate, or the affidavits of third parties. **Dhunsook Doss v Hurry Baboo** **Bourke O C 115.**

1704.—C P C O 9 r 3 of 1908=1882 s [illegible] —Case struck out for default in appearance.—

Where a case had been struck out for non-attendance of the parties, an order was made for its restoration on an affidavit that the absence of the parties was owing to an understanding between them for an adjournment, and that the plaintiff had a case on the merits. The order was made apparently under s 119. **Damoodur Doss v Choonee Bibee.** **Cor 120, 123=2 Hyde 216.**

1705.—C P C O 9 r 3 of 1908=1882 ss 98, 99 (1859, s 110)—Restoration of case struck off by mistake [illegible] being compromised.—

It is incidental to every Court of Justice to be able, in its discretion, to restore to its files any case which it has itself removed therefrom undetermined. **Deen Dyal Paramanick v Ram Coomar Chowdhry** **9 W R 283**

Notes.—Ref: 7 Bom L R 723; 772.

1706.—C P C O 9 rr 3, 4; O 17 rr 2, 3=1882 Ss 98, 99, 158—Application for adjournment by pleader—Rejection of application-Withdrawal of pleader from suit—Dismissal of suit for plaintiff's default—Whether fresh suit maintainable.

An application was made on behalf of the plaintiff for a further adjournment of a week on the grounds that his witnesses were not present, and that copies of certain documents could not

be got from Court. The application was rejected, whereupon the plaintiff's pleader stated that he was not in a position to proceed with the case for want of evidence. The defendant was absent and the suit was dismissed "for the plaintiff's default or rather for want of prosecution." The plaintiff brought a fresh suit on the same cause of action:

Held, that the mere physical presence of a pleader not instructed for the purpose of proceeding with a suit is not an appearance in the sense of Chapter VII of the Civ Pro Code of 1882, and that the suit was dismissed for default.

Held, also, that the case fell under S. 98 Civ Pro Code, and that the plaintiff was entitled to bring a fresh suit, under S. 99. (10 C W N 40 rel. upon.) **Bejoy Chand Mahtap v Satish Chandra Chowdhury.** **9 Ind Cas 842.**

1707.—C P C O 9 rr 3, 4, 6, 9=1882 ss 98, 99, 100, 103—Dismissal of suit.

A pleader being engaged in another Court instructed two other pleaders to appear for him before the District Court in a suit in which he was appointed pleader by the plaintiff. Though the pleader appeared the Court dismissed the suit for want of appearance of plaintiff or any one duly authorized in his behalf. The District Judge having rejected the plaintiff's application for the restoration of the suit, the High Court in appeal directed the suit to be restored to the file. **Balwantrao Ganesh Oze v The Secretary of State for India.** **P J 1897, 357.**

1708—C P C O 9 r 3 of 1908=1882 s. 98—Practice.

When a case has been struck out in consequence of the non-appearance of the plaintiff, the Court will grant fresh summons. **Peary Mohun Doss v Parbutty Churn Mookerjee.** **1 Ind Jur N S 40.**

Notes:—Fol: 18 W R 269. Ref: 22 Bom 701; 922; 27 Mad 157.

1709—C P C O 9 r 3 of 1908=1882 s. 98—Dismissal for default in appearance—Non-appearance of plaintiff—Fresh suit.

When a suit is dismissed for default of the plaintiff, and no appearance has been entered by the defendant, the plaintiff can, under s. 110, Act

VIII of 1859, bring a fresh suit after a lapse fo thirty days if it be not otherwise barred by lapse of time. **Nabadwip Chandra Sirkar v Kalinath Pal.** **3 B L R Ap 130.**

See Pegha Mahton v Gooroo Baboo. **24 W R 114.**

1710—C P C O 9 r 3 of 1908=1882 s. 98—Default of appearance—Act XXIII of 1861 s. 38—Proceedings in execution of decree.

The provisions of s. 110 of Act VII of 1859 are properly applicable under s. 33 of Act XXIII of 1861 to proceedings in execution of decree. **Rajpal v Cheoramun.** **4 N W 10.**

See Seetul Pershad v Mahomed Kureem Khan. **[illegible] N W 164.**

Notes—Fol [illegible] N W P 164.

1711—C P C O 9 r 3 (=Civ. Pro. Code 1908, s. 110)—Proceedings against defendant while in jail—No deduction from period of limitation.

Plaintiff's suit was dismissed under s.110 both parties being absent and the suit was brought on file again on the application of plaintiff. Defendant being put in jail, the Court ordered a non-suit until he came out of jail, plaintiff offering no objection to the order. On the release of the defendant, the plaintiff applied to have the case brought on again. *Held* that his course was to bring afresh until precluded by the rules of limitation and that no deduction will be made from the period of limitation on account of defendant's imprisonment there, being nothing against a prisoner in jail being served with a summons in a suit against him. **Janee v Waris.** **39 P R 1869.**

C P C O 9 r 4=S. 99 of 1882

Notes—This rule corresponds to s. 99 of the C. P. Code 1882, with some additions and alterations. The important changes introduced in this rule are the addition of the words " *and postal charge (if any)* " after the words Court-fee and the substitution of the words " *within the time fixed before the issue of the summons*" for the words "within the time allowed for the service of the summons." The other changes are mere verbal.

"We have struck out the provisions about limitation contained in this rule These provisions will be incorporated in the Limitation Act."—*See the Report of the Select Committee.*

1712-C P C O 9 r 4 of 1908=1882 S.99-Failure of plaintiff to pay Court-fee for issue of summons—Non-appearance of defendant—Fresh suit Civ. Pro. Code 1859, s. 110.

Where the plaintiff in a suit failed to deposit the talbana required for the purpose of issuing summons to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as original defendants, by an order purporting to be made under this section, on a day previous, to that fixed for the hearing af such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit. **Gulab Dai v Jiwan Ram** **2 All 318.**

1713—C P C O 9 r 4=S. 99 of 1882.

Order reversed, the applicant not having been allowed an opportunity under s. 99 of satisfying the court by evidence of his sudden illness. **Banechand v Punja.** **1889 P J 216.**

1714—C P C O 9 r 4=(1882 s. 99)-Affidavit—Application—Restoration of a suit dismissed for default—Affidavit.

An application to restore a suit dismissed for default was not accompanied by an affidavit; the Subordinate Judge, on that ground alone, refused to entertain the same.

Held, that it was material irregularity for the Subordinate Judge to say that the application was bad because it was not accompanied by an affidavit when filed. **Gokaldas v Kisandas.** **3 Bom L R 130.**

1715—C P C O 9 r 4=1882 s. 99—Non-appearance of parties—Dismissal of suit—Restoring the suit to the file—Costs.

Where a suit is restored to the file under s. 99, Civ. Pro. Code, the Court has no jurisdiction at that time to pass any order as to the general costs of the suit. S. 99, unlike s. 103 of the Code, does not empower the Court to make terms as to costs. **Krishna v Ganesh.** **3 Bom L R 734 =26 Bom 201.**

1716—C P C O 9 r 4 of 1908=1882 s. 99 and s. 97 (Act XXIII of 1861, S. 7 and s.5)-Neglect to deposit talabana for application to execute decree.

A decree-holder having allowed the term of three years to run within a very few days of expiry before applying for execution, and then, though allowed five days to pay talabana, having neglected to do so, his application was found to be not bona fide. *Held* that s 7, Act XXIII of 1861 did not apply to the case, that section applying only to suits dismissed under the provisions of s. 5 of that Act. **Taruck Chunder Chuckerbutty v Huro Chunder Chuckerbutty** **15 W R 473.**

1717—C P C O 9 r 4 of 1908=1882 s. 99—Applicability of ss. 98 & 99 to an application under s. 549.

A petition was made under s. 549 of the Code of Civil Procedure praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, noone appeared to support it or to show cause against it and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that the counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause the petition should have been granted, and the absence of the petitioner's counsel was immaterial. *Held* that the matter was dealt with by s. 98 of the Code of Civil Procedure and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided. *Held* also that although no general rule could be laid down that the absence of the counsel when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit or an appeal or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances. In the present case, taking the circumstances into consideration the absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register. S.549 of the Code of Civil Procedure was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance and an application should not be granted under the section, of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. (3 Bom 241) followed. (8 M & W 13); (3 Mad 66) and (18 W R 103), referred to. **Lakmi Chand v. Guttu Bai,** **7 All 542=5 W N 127.**

—O 9 r 4—C P C O 9 r 3. Case No. 1697. **11 Ind Cas 317.**

—O 9 r 4—See C P C O 9 r 3 Case No 1698. **33 P R 1909.**

—O 9 r 4—Default of party to cause the attendence of his witness See C P C O 17 r. 3. Case No 3183. **8 A L J 1265.**

—O 9 r 4 See C P C O 5 r 3. Case No 1604. **[illegible] W N 1881 141.**

C P C O 9 r 5=S. 99A of 1882

Notes—This rule corresponds to section 99 A of the C P C 1882, with some additions and alterations. The only important change introduced in this rule is the addition of the words "*The date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers*" after the words "one year from." The above amendment has been made to meet the case-law. (13 Bom 500). The other changes are mere verbal.

See Cases under:—

(1)—Principal and surety—Discharge of Surety.

(2)—Summons, Service of.

C P C (1908) O 9, r 5=1882 S 99 A. See Practice-Civil cases—Affidavits. **5 Ind Cas 537.**

1718—C P C O 9 r 5—Transfer of Property Act Section 99.—Sale of mortgaged property in execution of money decree held by mortgagee set aside—Subsequent suit for sale on mortgage not barred.

Where a mortgagee had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, and such sale was set aside with regard to the provisions of S. 99 T P A—*Held*, that the mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage notwithstanding S. 43 C P C. (16 All 415. 25 Bom 161 ref to.) **Bhola Nath v Muhammad Sadig 1904 A W N 2=26 All 228.**

Notes—Ref: 5 A L J 732; (1908) W N 265.

1719—C P C O 9 r 5—(1882 S. 99 A.)

Summons—Fresh summons:—To satisfy the terms of s 99 A, Civil Procedure Code, the plaintiff must (1) apply within a year of the last summons unserved and also (2) satisfy the Court that he used diligence in the meanwhile. If he fails to establish any of the two points, his suit must be dismissed. **Byaharimal v Satva. 3 Bom L R 402.**

1720—C P C O 9 r 5=(1882 s. 99 A).—Service of summons—Period.

S. 99-A of the C. P. C. 1882, is not very happily expressed, but it means that when a plaintiff fails for a period of one year from the return of the summons unserved, to apply for the issue of a fresh summons and on that application to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process then, and only then, the Court may dismiss the suit as against such defendant under that section. The section refers to the lapse of a year, not from the filing of the plaint, but from the return of the summons unserved. **Jugalprasad v Bisesar 7 Bom L R 928.**

1721—C P C O 9 r 5—Suit for profits-Previous suit for same period dismissed as defendant not served, effect of such dismissal:—Where a suit for profits against three defendants was dismissed owing to a failure to the plaintiff to cause one of the defendants to be served, *held* that a second suit for profits, for the same period, against the same defendants, was maintainable. The former judgment not being a decision on the merits, did not bar the subsequent claim. The principles embodied in S 99 (a) of the Civ. Pro.

Code applied to a case like this. **Sita Ram Singh v Pokhpal Singh. 3 A L J 576 (F B) =A W N 1906 233=I M L T 447=28 All 749.**

C P C O 9 r 6=S. 100 of 1882.

Notes—This rule corresponds to section 100 of the C. P. Code, 1882, with some additions and alterations. The words "*When the suit is called on for hearing, then*" have been substituted in sub-rule (1) for the words "procedure shall be as follows:" which occurred in the old section; and the words "*was not duly served*" have been after the words "summons" in sub-rule (2). The other changes are mere verbal.

Section 104 of Act XIV. of 1882, which prescribed the procedure where defendant residing out of British India does not appear, has been omitted for the following reasons: "section 104 originally formed part of section 60 of Act VIII of 1859, and in combination with the rest of that section it was appropriate. As a separate section, however, it is misleading, and it certainly is not now required in view of the provisions for service on a defendant residing out of British India, and for proceeding with a suit *ex parte* when a defendant does not appear. Its retention would involve a diversity of procedure which the Committee think undesirable." See 23 All 99 noted below. *See the Report of the Special Committee.*

(1) **General (1722).**
(2) **When summons duly served. (1723-1728)**
(3) **Summons not duly served (1729-1731)**
(4) **Summons duly served but not in due time (1732-1733)**
(5) **Adjournment for plaintiff's default-Payment of costs (1734-1735).**

(1) General.

1722—C P C O 9 r 6=(1882 S 100).—

Applicable to defendants outside British India. S. 100. C. P. C. is not limited in its application to defendants residing within British India. **Fakhr-ud-din v Ghapur-ud-din, 1901 A W N 1=23 All 99.**

(2) When summons duly served.

1723—C P C O 9 rr 6, 7 O 17 r 2(=ss.111 and 147 C P C 1859)—Hearing adjourned after issues framed—Absence of defendant—Ex parte.—

In this case the parties were present at the first hearing, issues were framed and the case adjourned. At the adjourned hearing defendant did not appear. *Held* that the decree passed against him was *ex parte*. **A Reference by the Judge Small Couse Caurt Delhi,**

6 P R 1866.

1724—C P C O. 9. rr. 6. 13; O 17 rr 2, 3, S 115=(1882 Ss. 100, 108, 157, 158 and 622). Adjourned hearing—Decree ex parte—Restoration of suit—Revision.

Where, on a date to which a suit was adjourned for hearing, the Court, after taking evidence, passed an *ex-parte* decree.

Held, that the order was passed under S. 100 read with S. 157, C. P C.,and could be set aside by an application under S. 108.

Held, also, that, though the order under S. 108 passed by the lower Court was not, in form, a proper order, the High Court ought not in the exercise of the discretion given to it under S. 622, C. P. C. to interfere with it. (34 Cal 235 and 8 C W. N 621, fol. 23 All 462 expl.)

Nagendra Kumar Basu v Nabin Mandal.

36 Cal 189=1 Ind Cas 741.

1725—O 9 r 6; r 13=(1882 Ss. 100, 108).—

Exparte decree—Appeal—Onus on plaintiff to show summons duly served.

Where a defendant against whom an *exparte* decree has been passed appeals against the decree, it is sufficient in the first instance to establish that in the court which passed the *exparte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served. If he seeks the summary remedy of an application under s 108 C. P. C. he should show that the summons was not duly served on him. **Fakhr-ud-din v Ghapur-ud din**

1901 A W N 1=23 All 99

1726—O P C O 9 r 6 of 1908=1882 S. 100-Appearance by plaintiff only—Hearing exparte:—

(2) When summons duly served—*Concld.*

If on the day for hearing, the plaintiff appears and the defendant does not appear, the proper procedure to follow is that prescribed by s. 100 of act X of 1877 whether the defendant was summoned only to appear and answer the claim or was summoned to appear and give evidence. Before proceeding to hear exparte, it is not necessary to show that all the process of law to compel the attendance of the defendant as a witness, is exhausted. Due service of the summons upon him, is sufficient. If such service is not proved then the courses to be followed are one or other given in cls. (b) and (c) to s. 100.

Taruek Nath Mullick v Jeemat Neaya.

[illegible] Cal [illegible]

1727—1728—Civil Procedure Code O 9 r 6; O 5 rr 5, 6, O 9 rr 1 6, 7; O 8 r 1 r 6=(1882 Ss 68, 69, 96, 100, 101, 110 and 111) High Court Rules—Bom Rule 111—Ex parte decree—Suit set down for hearing before the date fixed in the summons—Civil Procedure Code (Act XIV of 1882), Secs. 68. 69, 96, 100, 101, 112 and 113.

The plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date fixed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules.

Dhirajlal Panachand v Hermusji Edulji Bottlewala 10 Bom L R 301=32 Bom 534.

See also cases under:

(1) Exparte Decrees.

(2) Decree.

(3) Appeal, Exparte Cases.

(3) Summons not duly served.

1729—C P C O 9 r 6—Ex parte decision against defendant not served with summons.

An ex *parte* decision against a defendant who had never been served a notice of the suit is bad.

Genu v Bhagu. 1890 P J 136,

1730—C P C O 9 r 6 r 13 S 104, O 43 r 1=(1882 Ss. 100, 108, 588.) Rules of 4th April 1894 -Rule 28-High Court's power in revision-Service of summons-Ex parte decree,

C P C (1908) O. 9 r. 6=(1882, S. 100) –*Contd.*

(3) Summons not duly served—*Concld.*

A summons was served personally upon the defendant who was a Railway servant. He endorsed on it that he could not accept it unless it was served through his officer and returned it to the peon. The Court however proceeded with the suit and passed an *ex-parte* decree. The application to set it aside was dismissed. *Held*, that the High Court could interfere with order in revision. *Held*, further that the rule passed by the High Court that summons on Railway servants should be served through their officers had the force of law and the service on the defendant in this case was no service at all.

Wazir Khan v Naqui Vawar 6 A L J 45 =1 Ind Cas 163.

1731—C P C O 9 r 6 =Ss. 100, 158 of 1882

Where out of two defendants one only was served with summons and the Lower Court rejected the plaintiff's claim on the ground that he had failed to take proper steps to serve the other defendant with summons, *held* that the order so far as it rejected the suit against the defendant who was duly served was bad and that as regards the other defendant the Court should have been guided by the provisions of Ss 158 and 100. **Pestonji v Lalya** 1891 P J 63.

(4) Summons duly served but not in due time.

1732—C P C O 9 r 6, O 5 r 6 (=ss 100 (a) 69 Civ Pro Code 1882)—Ex parte proceeding—Summons, due service of—Time, sufficient for appearance allowed.

S. 100 (a) of Civ Pro Code makes it incumbent upon Courts before proceeding *ex parte* to find that the summons in the case has been duly served upon the defendant proceeded against. In a case in which the process-server has not known the defendant before serving the summons it is necessary, in the first place, before proceeding with the case ex parte, to have the evidence of some one who did know him or her before the service and who can state on oath that the summons in the case had in his presence been personally served on the person for whom it was intended or that a copy of it had been affixed to the outer door of the house in which he personally knew that the defendant ordinarily resided. Without such evidence, the Judge is not justified in proceeding to hear a case ex parte. "Duly served" in s 100 (a) of the Code means amongst other things, served as contemplated by s 69 of the Code that is to say, within a time sufficient to allow of the defendant appearing on the fixed day in the summons and being able to answer on that day. It should have been considered whether service on the afternoon on the 27th January on an old woman of 65 years of age to appear and answer at a Court some distance off on the morning of the 29th January was due service.

C P C (1908) O. 9 r. 6=(1882, S. 100) –*Contd.*

(4) Summons duly served but not in due time—*Concld.*

Ma Shwe Pon v K K A R C Raman Chetty 1 L B R 226.

1733—C P C O 9 r 6 of 1908=1882—s 100 para 3 (1859 s 113)—Adjournment for defendant to produce evidence where he appears although proper notice not given.

Where, if defendant had not appeared the Court would have been bound under s 113 Act VIII of 1859 to adjourn the hearing to a future day on the ground that sufficient time had not been given to him to appear and answer to the suit, it was held that his appearing ought not to put him in a worse position, and that it was a reasonable request made on his behalf by his vakil that time should be given to him to produce such evidence as he could in support of his case. **Abdool Kureem v Awlad 18 W R 141.**

(5) Adjournment for plaintiff's default-Payment of costs.

1734—C P C O 9 r 6 of (1908)=(1882) Procedure—Civil Procedure Code Secs 100 and 647—Dismissal of suit for default—Application to restore suit—Notice of application—Service of notice—Negligence—Second application for issue of notice—Costs.

A suit having been dismissed for plaintiff's default he applied for the restoration of the suit to the file and a notice was issued to the defendant to show cause why the suit should not be restored. The notice was returned unserved owing to plaintiff's neglect to point out the defendant to the serving officer. The plaintiff having applied for a fresh notice the Subordinate Judge rejected the application.

Held, that the Subordinate Judge had no power to reject the plaintiff's application for a fresh notice. Sec 100 of the Civil Procedure Code which by Sec. 647 is made applicable to such a proceeding, only enabled him to order a

C P C (1908) O. 9 r. 6=(1882, S. 100)
-Concld.

(5) Adjournment for plaintiff's default-Payment of costs—*Concld.*

fresh notice to issue and if he thought proper to order plaintiff to pay the costs occasioned by the necessary postponement. **Lallubhai Vajeram v Bai Magangavri P J1893 p 8; 18 Bom 59.**

1735.—C P C O 9 r 6 of 1908=1882, S 100, para 2, and section 101 (1859, sec 111) —Non-appearance of defendant—Adjourned hearing-Costs :—

A case had been placed on the undefended board in consequenee of the non-appearance of defendant, and the hearing had been adjourned at the instance of the plaintiff to a subsequent day. On that day the defendant appeared, and it was contended that he could not be heard until he had shown good cause for his previous non-appearance, or at least that the Court would put him on terms. The Court held that the defendant was entitled to appear as a right, and an application that he should pay the costs of a postponement was refused. The costs were ordered to be costs in the cause. **Newton v Kurneedhone. 9 B L R Ap 15.**

C P C O 9 r 7=S. 101 of 1882.

Notes:—This rule corresponds to section 101 of the C P C Code, 1882. The only change introduced is the substitution of word "*where*" for the word "if" in the beginning.

C P C. O 9. r 7.

Application to set aside *ex parte* proceedings —When to be made. **Remand. 7 N L R 172.**

1736-1737-C P C O 9, rr 7and 13 (=Ss 101, 108, Civ Pro Code. 1882)—Refusal of defendant to be heard-Competency of Court to set aside ex parte decree.—

Where a defendant was refused a hearing under sec 101 and a decree was passed *ex parte* against him, it was competent to the Court to set aside the *exparte* decree under section 108 of the Code. (8 Cal 272 Ref). **Bhaoo Patel v Naroo Kunbi. 10 C P L R 45.**

1738.—C P C O 9 r 7, O 5 rr 5, 6; O 9, rr 1, 6, 7 O 8 r 1 r 6=(1882 Ss 68, 69, 96, 100, 101, 110 and 111)—High Court Rules—Bom Rule 111-Ex parte decree—Suit set down for hearing before the date fixed in the summons—Civil Procedure Code (Act XIV of 1872), Secs 68, 69, 96.100, 101 112 and 113.

C P C (1908) O. 9 r. 7–(1882, S. 101
-Contd.

The plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date fixed in the summons for the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. **Dhirajlal Panachand v Hormusji Edulji Bottlewala. 10 Bom L R 301=32 Bom 534.**

1739.—C P C O 9 r 7, O 17 r 3 ; Sec 101, O 43 r 1, 105=(1882 Ss 107, 157, 288, 591).

Sec. 591, Civil Procedure Code—Meaning of "affecting the decision of the case" in sec 591, C P C.—Interest on an instrument—Presumption in the absence of any clear agreement for interest to run—S 210 Civil Procedure Code—Instalment decree.

What is sufficient reason for allowing instalments. The words "affecting the decision of a case with reference to the merits of it." Where a Court of first instance after the closing of the case for judgment the defendant being absent and unrepresented, subsequently permits the defendant to proceed with the case, the appellate Court cannot on the appeal from the decree eventually passed, interfere with the terms imposed upon the defendant. (23, Cal 738, (F B); 20 Bom 380 ; 16 Cal 426 : 22 Cal 981 : 24 All 461 : 25 All 280, Referred to).

Where the money is advanced at interest and part is taken by the borrower in the shape of a bill of exchange, letter of credit or other negotiable instrument, the ordinary presumption is that interest on that part runs only from the date when the borrower obtains the money secured by the instrument. But if the parties so intend the instrument may be regarded as the equivalent of cash paid at its delivery, and it is a question of fact what the intention of parties was. (30 Bom 27 ; 28 All 54 ; 3 M I A 432, referred to).

The power conferred on the Court by section 210, C P C of directing that the amount made payable by a decree for money shall be paid by instalments can only be exercised on sufficient reason shown. The mere fact that the debtor is hard pressed or is unable to pay in full at once, is not a sufficient reason. Ordinarily he should be required to show his *bona fides*, by arranging

C P C (1908) O 9 r 7=(1882, S. 101) -*Concld.*

for prompt payment of a fair proportion of the debt. (3 All. 129. Referred to.) **Mohomad Akbarkhan v R B Kastur Chand Daga.**
2 N L R 179

—**O 9 r 7**—Effect of setting aside an exparte decree. **See** C P C O 9 r 13. Case No 1907.
21 Mad 324.

—**O 9 r 7**—When summons duly served. **See** C P C O 9 r 6. Case No. 1723.
6 P R 1866.

C P C O 9 r 8=S. 102 of 1882.

Notes.-This rule corresponds with section 102 of the C P Code. 1882. with some additions and alterations. The words "*when the suit is called on for hearing*" have been added after the words "does not appear". The other changes are more verbal.

1 **Applicability and scope of 1740-1743**
2 **Abandonment of proceedings under s. 269 Act VIII of 1858 1744**
3 **First hearing of suit 1745**
4 **Identity of cause of action in two suits. notwithstanding difference of relief claimed 1746**
5 **Dismissal of suit for plaintiff's non appearance 1747**
6 **Order dismissing a suit for default of appearance—Construction 1748-1752**
7 **Application for adjournment—No such appearance 1753**
8 **Dismissing in default in early part of the day—sufficient cause 1754**
9 **Part heard case—Dismissal for default 1755**
10 **Two claims—Dismissal of the whole case for default-Abandonment of the second claim 1756**
11 **Absence of counsel—Return of brief by junior counsel—Practice 1757**
12 **Absence of party and pleader—Dismissal of suit 1758-1759**
13 **Objection by defendant dismissed for default 1760**
14 **Plaintiff's default 1761**
15 **Non-attendance of plaintiff 1762**

C P C (1908) O 9 r 8=(1882 S. 102) -*Contd.*

16 **Application by arbitrator for extension of period—Dismissal for default 1763-1765**
17 **Whether appeal lies—Suit struck off for default 1766—1769**
18 **Cases in execution of decree 1770-1773**

—**O 9 r 8**—Dismissal of former suit for default—Fresh suit barred. **See** O 9 r 9.

- **O 9 r 8**—Application to set aside-Dismissal for non-appearance—Maintainable or not. **See** C P C O 9 r 9.

O 9 rr 8,9, of(1908)=(1882)ss.102-103

See cases under:—

(1) Appeal—Default in appearance. Cases Nos (533). (503) **8 All 20. 20 Bom 736.**

(2) Appeal—Default in Appearance. Cases Nos (498). (501). **3 All 292. 9 All 427.**

(1) Applicability & scope of

1740.—C P C O 9 rr 8: 9 s 141—(1882 ss 102 103. 647.)

Construction of Statute—Special jurisdiction—Land Acquisition Act, ss 12, 18.

Certain persons, who were parties in a land acquisition proceeding, being dissatisfied with the apportionment of the compensation-money made by the Collector, obtained a reference to the Court. under s. 18 of the Act, but as they did not appear at the hearing of the same. it was struck off.

Held that a suit instituted by the same persons in the Civil Court for the apportionment of the compensation-money was barred by ss. 102 and 103 Civ Pro Code.

Ss 102 and 103, Civ Pro Code. apply to proceeding before the Court, to which a reference is made under S 18 of the Act, owing to the operation of s. 647. Civ Pro Code, which is made applicable to such proceeding by sec. 53 of the Act.

Persons who were not parties in the land acquisition proceedings were not debarred from instituting a suit for apportionment in the Civil Court.

C P C (1908) O 9 r 8=(1882 S. 102) -*Contd.*

(1) Applicability & scope of—*Concld.*

Stephen, J.—*Quære* —Whether persons, who were before the Collector, but not before the Court to which reference was made under s. 18 of the Act, would be debarred from instituting such a suit? 7 C W N 538, (7 Cal 388, at P 393, 12 Cal 33 Ref:) **Bhandi Singh v Ramadhin Roy.** **10 C W N 991: 2 C L J 359.**

Notes:—Ref: 11 C W N 356; 5 C L J 669; 34 Cal 470. Fol: 35 Cal 470=13 C W N 636.

1741.—C P C O 9 rr 8, 9 (=ss 102, 103, Civ Pro Code, 1882)—**Trial of suit in the plaintiff's absence—Duty of revenue Court to give notice of date and place to parties.—**

Revenue Courts are bound to give the parties notice of the date and the place of trial of cases. If a Revenue officer is on tour and unable to make a programme of dates he should postpone their hearing till his return to the *Sudr*. He should, for the convenience of the parties, make programme of his tours and adhere to them. If he has to vary his tour he should take timely steps to give parties fresh notice. Every record should show that due notice of date and place has been given. If the record does not show this, it should be presumed that due notice was not given.

Tegha v Mussammat Pursenun.
12 P L R 1903=8 P R 1902.

1742-1743-C P C O 9, r 8 (=Civ Pro Code, 1882, s 102)—**Duty of parties to be in attendance.—**

A Court is not in any way bound to do more than have a cause called and it is the duty of the parties and their legal representatives to be in attendence. **Balaram v Mulla**
5 C P L R 81.

C P C O 9, r, 8=S 102. effect on proceedings under s 90 of the Transfer of Property Act.

See Cases under:—

(1) Transfer of Property Act 1882 s 90.
(2) C P C (1908) O. *34*
(3) Mortgage

(2) Abandonment of proceedings under s. 269 Act VIII of 1859

1744.—C P C O 9 r 8 of 1908=1882 s 102.

The abandonment of proceedings taken under s 269, Civil Procedure Code, 1859, does not amount to dismissal in default under s 114, and is no bar to plaintiff's bringing a fresh suit. **Futteh Ali v Kureem Ali.** **10 W R 61.**

Notes—Dist: 10 W R 477.

(3) First hearing of suit

1745.—C P C O 9 r 8 of 1908=1882 s 102 **Non-appearance—Civil Procedure Code, 1859, ss 110, 111, and 114.—Semble.—**

S. 114 as well as ss 110 and 111 of the Code have reference only to the first hearing of the suit, which may be either on the day named in the summons or on a subsequent day to which such hearing may have been adjourned.

Comalammal v Rungaswamy Iyengar.
4 Mad H C R 56.

Notes—Fol: 6 M H C R 262 Dist: 4 M H C R 201: 1 Mad 287, Ref: 10 Mad 270, 272: 34 Cal 235; 5 C L J 260: 18 M L J 51, Disap: 19 M L J 760.

(4) Identity of causes of action in two suits, not-with-standing the difference of relief claimed.

1746—C P C O 9 r 8 (1908)=1882 s 102.

In 1883 a mortgagor sued for the redemption of the mortgage effected in 1853 of villages in Oudh subsequently included in the mortgagee's talukhdari estate and sanad. The defence of the mortgagee was that the mortgagor had brought a redemption suit in 1864, and it was dismissed for default and hence the second suit was not maintainable. *Held*, that, although the plaintiff who had claimed in the fomer suit, the under proprietary right in virtue of a subsettlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed, did not affect the identity of the cause of action, which was in both cases the refusal of the right to redeem and that under s 114 of the Act the judgment of 1864 is final. **Shankar Baksh v Daya Shankar.** **15 Cal 422; 15 I A 66.**

Notes—Ref 19 Cal 373: 14 Bom 31; 25 Mad 736; 12 M L J 103.

(5) Dismissal of suit for plaintiff's non-appearance.

1747.—C P C O 9 rr 8; 9; O 17 r 3 (1882 ss. 103. 158.)

C P C (1908) O 9 r 8=(1882 S. 102) -Contd.

(5) Dismissal of suit for plaintiff's non-appearance—*Concld.*

Where, at an adjourned hearing of a suit, the witnesses on behalf of a party were not in attendance, and the party applied for the issue of warrants against them, but the Court refused the application, and the pleader thereupon intimated that he had no further instructions to appear, and the suit was dismissed.

Held, that the dismissal was not under s 158, but under s 102 of the Code. (34 Cal 235; 5 C L J 260, Rel on) **Ganga Rai v Gudar Rai** **5 Ind Cas 499.**

(6) Order dismissing a suit for default of appearance—Construction.

1748.—C P C O 9 r 8 of 1908=1882, s. 102.

An order will be construed to be under s 102 if, apart from the description given to it by the Court and apart from the actual fact of plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the ground, whether right or wrong, that the defendant appears and the plaintiff does not appear. Where his suit having been dismissed for default of appearance under s 102 of the Code of Civil Procedure, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under s 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits, the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear. It is not an "appearance" within the meaning of section 102 of the Code of Civil Procedure, when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply for an adjournment. (20 All 195), and (23 Bom 414), approved. (N W P (1873) 74,) (N W P (1875) p 77) and (3 All 519) referred to.
Lalta Prashada v Nand Kishore.
19 W N 176 F B; 22 All 66.

Notes.—Ref 8 C W N 621; 5 C L J 247 F B; 11 C W N 329 F B; 34 Cal 403 F B; 18 M L J 51; 19 M L J 760.

1749.—C P C O 9 r 8, O 17 r 2, 3 (Ss 102, 157, 158.)—Dismissal for default.—

Where time is allowed to a plaintiff to produce his witnesses and he fails to do so and is him-

C P C (1908) O 9 r 8=(1882 S. 102) -Contd.

(6) Order dismissing a suit for default of appearance—Construction—*Contd.*

self absent on the day fixed for the hearing, *held*, that the Court may proceed under Sec. 157 of the Code and dismiss the suit for default under section 102 It is not incumbent on the Court, nor would it usually be the correct procedure, to proceed under Section 158, though the party absent may have also made default of the kind referred to in that Section. **Ram Rattan v Hyat Muhammad** **P R 41 of 1880 Civil**

1750.—C P C O 9 r 8 (1908)=C P C S 102 (1882) Dismissal for default.

The plaintiff in this suit, a Pardanashin lady, did not appear on the day fixed for the disposal of the case and her pleader was engaged in another suit. Her case was consequently dismissed for default. She made an application to the Munsif which was also dismissed, the Munsif holding that the dismissal was under s 157 of the Code of Civil Procedure. Against that order the plaintiff appealed and the District Judge reversed that order and ordered the Munsif to restore the case to his file. In revision before this Court under s 622 of the Code of Civil Procedure it is contended that the Judge exercised "a jurisdiction" not vested in him by law.........(s 622 of the Code of Civil Procedure). *Held* that the suit must be treated to have been dismissed under s 102 or 157 of the Code of Civil Procedure. In either case an appeal lay to the Judge. His act therefore cannot be said to come under s 622 of the Code of Civil Procedure.
Sheonandan v. Jamna **7 W N 65.**

1751—C P C O 9 r 8; O 17 r 2 (1882 Ss. 102, 157) "Appearance," meaning of—Application by pleader for adjournment—Refusal—Pleader stating that he had no instructions—Effect—Dismissal under s. 157, C P C—Authority to represent client-Barrister and pleader, distinction between—Advocate.

Held, that, where, at any adjourned hearing of the suit, there is no appearance by the plaintiff and there are no materials on record, the appropriate procedure is that laid down by S. 157, C P C., 1882. (*Per Crouch. A J C*).

An appearance at an application for adjournment which is refused is not an appearance at the hearing of the suit.

C P C (1908) O 9 r 8=(1882 S. 102) –*Contd.*

(6) Order dismissing a suit for default of appearance—Construction—*Contd.*

An "appearance" is nothing more than physical attendance in the Court. If, therefore, when the hearing commences, the plaintiff or his duly appointed pleader is actually present in Court, there is an appearance of the plaintiff at the hearing. If it be desired that there should be no appearance, the result can, in reality, be attained only by the plaintiff and his pleader walking out of the Court when the case is called on for hearing. The usual formula used by pleaders "I am not instructed" or "I have no instructions," is prefectly well understood by most Judges; and where no dissent is expressed, the general opinion seems to be that the pleader is fairly justified in assuming that he is being treated as not present.

Held, that on the facts of the present case, the presumption, that the order of dismissal was under s. 157 C P C 1882, holds good.

The authority of a Barrister or advocate to represent a party is based on the fact that he has "received instructions" from an Attorney or Solicitor. Instructions are not merely the information as to facts, but constitute his authority to represent the client. If, therefore, he states in Court that he has no instructions, that concludes the question of his representation. But a pleader's authority is based on the fact that a 'vakalatnama' has been filed. And his authority can be terminated only on a written application by the client and with the consent of the Court. (34 Cal 235, Ref, 1 S L R 224; 34 Cal 403 (F B), Ref. 23 Bom 414; 22 All 66; 30 Mad 374, Ref.)

Fakir Mahomed v Viran wife of Koji. 3 S L R 208=6 Ind Cas 851.

1752—C P C O 9 rr 8, 9; O 17 rr 2; 3 (1882 Ss. 102, 103, 157 & 158) Pleader applying for adjournment—Effect.

Where on the date of hearing the Plaintiff's Pleader applied for an adjournment for one hour only and adjournment was granted to enable the pleader for the plaintiffs to consider what course he should pursue. On the case being called on at 2 P M, the pleader for the plaintiffs got up and left the Court. His name was called out and the names of the plaintiffs were also called out. The pleader had not stated that he had no instructions to proceed with the suit. The Judge dismissed the suit.

C P C (1908) O 9 r 8=(1882 S. 102) –*Contd.*

(6) Order dismissing a suit for default of appearance—Construction—*Concld.*

Held, that the order dismising the suit was an order under Ss. 108 & 157 and not under s. 158 of the Code, and that the plaintiffs remedy was by an application under s. 103 of the Code.

Allahdino v Nawalmal. 1 S L R 224.

(7) Application for adjournment—No such appearance.

1753—C P C O 9 rr 8, 13, O 15, r 4 (=ss 102 108, 155, Civ Pro Code, 1882).

Counsel's appearance in Court, merely to apply for an adjournment, is no such an appearance in the suit as will make ss. 102, 103, Civ Pro Code, 1882, inapplicable. **Hinga Bibee v Munna Bibee. 31 Cal 150=8 C W N 97.**

Notes—Ref 46 P R 1905=178 P L R 1905, 34 Cal 403. F B=11 C W N 329=5 C L J 247=2 M L T 123, 1 S L R 115, 10 Bom L R 904.

(8) Dismissing in default in early part of the day—Sufficient cause.

1754—C P C O 9 r 8=1882 s. 102—Case and application to restore it dismissed in default in early part of the day.

Held, that, the Courts should wait for the parties for some reasonable time when the case is called on for hearing. A case or a petition is not to be dismissed in early part of the day.

Held, also, that, where temporary absence of plaintiff or his pleader has been satisfactorily explained, a case or a petition should be restored, especially where dismissal has taken place at 11 A M. **Chaudri Jesa Ram v Thakar Das. 197 P W R 1911.**

(9) Part heard Case—Dismissal for default.

1755—C P C O 9 r 8 O 17 r 1 r 2 (1882 Ss. 102, 156, 157)—Failure of plaintiff to appear on—Propriety—Court's duty.

Where a partly heard case was adjourned to a certain date for further hearing and where, owing to the failure of plaintiff to appear on that date, the lower Court dismissed the suit for default, *held*, that the lower Court did not properly exercise its discretion in dismissing the suit under S. 102, C P C (1882), and that it was clearly the duty of the Judge to proceed to hear the defend-

(9) Part heard case—Dismissal for default—Concld.

ant, unless, on consideration of the evidence for the plaintiff, he was of opinion that the suit should be dismissed, and to adjudicate the case on its merits. (25 All 194 Ref:) **Ram Dam Pandey v Narayan Murti.** **5 L B R 75= 3 Ind Cas 683.**

(10) Two claims—Dismissal of the whole case for default—Abandonment of the second claim.

1756—C P C O 9 r 8=(1882 Sec 102)—Suit for two claims—Dismissal of one—Decree.

A suit was brought, praying, first for a decree for the amount paid by the plaintiff to release certain property from attachment, and secondly, for damages on the ground of illegality of attachment. The first prayer was dismissed and the trial with regard to the second prayer was proceeded with. No decree was drawn up as regards the first prayer, and an application for drawing up a decree was rejected. The plaintiff's application to withdraw his claim for damages being refused, he did not appear and the whole suit was dismissed.

Held, that the dismissal of the first prayer was a decree and the Court had no power to dismiss the whole suit under s. 102 of the Code of Civil Procedure. (4 Mad 134; [illegible] W R 63; & 17 All 195, Fol; 10 Cal 1005; 11 Cal 644 Diss.)

Kanhaya Lal v The National Bank of India Limited Delhi. **11 C L J 449= 14 C W N 594=12 Bom L R 430= 37 Cal 426=8 M L T 1=6 Ind Cas 592 =20 M L J 470=51 P W R 1907 =121 P R 1907.**

(11) Absence of counsel—Return of brief by junior counsel—Practice—

1757—C P C O 9 rr 8; 9; O 10 r 1—(1882 Ss. 102, 103, 117)—Suit dismissal of, for absence of counsel—Counsel not able to appear.

Ss. 102 and 103, Civ Pro Code (1882), do not apply when the plaintiff is present in Court, though the counsel whom he has instructed to conduct his case are not present when the case is called on for hearing. Under such circumstances, the Court hearing the case should proceed under s. 117 of the Code.

If there is a chance of neither of the two counsels briefed in a case being able to attend when the case is called on, one of them must return his brief in good time. In case of dispute, it is the duty of the junior to return the brief or to make arrangements for some other counsel to attend till he can come in. **Esmail Ebrahim v Haji Jan Mahomed** **10 Bom L R 1172= 33 Bom 475.**

(11) Absence of counsel—Return of brief by junior counsel—Practice—Concld.

—**O 9 r 8**—Applicability and scope. **See** C P C O 9 r 9 Case No 1778. **9 A L J 666.**

—**O 9 r 8**-Application to set aside—Dismissal for non appearance maintainable or not. **See** C P C O 9 r 9 Case No 1791 **34 Cal 235.**

—**O 9 r 8—See** C P C (1908) S. 2 cl 2 Case No (25). **8 C W N 313.**

—**O 9 r 8**—Application to set aside—Dismissal for non appearance-Maintainable or not. **See** C P C O 9 r 9 Case No 1798. **[illegible] Ind Cas 156.**

—**O 9 r 8—See** C P C O 17 rr 2, 3 Case No 2101 **5 Ind Cas 23.**

—**O 9 r 8—See** C P C S. 2 cls. 2, 14 Case No (17). **4 L B R 17 (F B).**

—**O 9 r 8—See** C P C O 17 r 2 Case No 2094 **10 P R 1871**

—**O 9 r 8**-Any one of the plaintiffs or defendants may appeal. **See** C P C O 41 r 4 Case No 2963 **132 P W R 1910.**

—**O 9 r 8**—Preceedings to which this section applies. **See** C P C (1908) S. 141 Case No (1331) **3 P W R 1912.**

(12) Absence of party and pleader—Dismissal of suit.

1758—1759—C P C O 9 rr 8; 9: O 17 r 2 (1882 Ss. 102 and 157)—Dismissal of suit.

The very drastic order, for which S. 102 of the C P Code provides, cannot properly be passed except when the conditions are such as are contemplated in the section. Hence, the Court would not be justified in dismissing a suit under the section, when the plaintiff has adduced all the evidence on which he intended to rely, but neither he nor his pleader was present on the subsequent hearing. **Ningappa Virtappa Yelloor v Gowdappa** **7 Bom L R 261**

Notes—Ref: 34 Cal 403 F B; 235; 5 C L J 260, 247 F B; 11 C W N 329 F B; 11 Bom L R 409.

C P C (1908) O 9 r 8=(1882 S. 102) -Contd.

(13) Objection by defendant dismissed for default.

1760—C P C O 9. r 8—Execution of decree—Application for attachment—Effect of—Civil Procedure Code, 1882, Sections 102, 280, 283, 617.

Held, that where an objection by a defendant to an application by a decree-holder for attachment of property has been dismissed for default, such dismissal is not equivalent to an order under Section 280, Civil Procedure Code, disallowing the objection so as to necessitate the institution by such defendant of a suit to establish the right which he claims to the property in dispute, within the meaning of Section 283 of the Code.

(12 C L R 43, Dist: 3 All 504, cited.)

Rura Mal v Kuria **62 P R 1894.**

(14) Plaintiff's default.

1761-C P C O 9 r 8=Ss. 102, 647.-Where the taking of accounts between the parties is ordered under *Darkhast*, the absence of the plaintiff on the fixed day could not justify the dismissal of the Darkhast. It ought to have been proceeded with *ex-parte* or postponed. **Shri Chintaman Balaji Dev Maharaj v Bapuji.** **[illegible] P J 73.**

(15) Non-attendance of plaintiff.

1762—O 9 r [illegible] of 1908=1882 s 102—The dismissal of [illegible] suit for the plaintiff's non-attendance is a highly penal matter, and the punishment ought not to be inflicted unless after a distinct order to attend, and upon proof that the plaintiff has deliberately disobeyed the Court's order.

Pearee Mohun Bose v Hurish Chunder Ghose. **17 W R 141.**

(16) Application by arbitrator for extension of period—Dismissal for default.

1763—O 9 r 8 sch II r 8-Arbitration-Application by arbitrator for extension of period allowed for making award:—

The arbitrator applied for extension of period allowed for making the award. The plaintiff failed to attend Court on the date fixed in the case and the Court dismissed the suit. *Held* that the action of the Court was harsh; when a case is under arbitration, a Court should not hastily dismiss the suit for non-appearance in Court of the plaintiff. Much less should this be done when the arbitrator has made an application for extension of time for filing award. *Held* also, that when an arbitrator asks for extension of time and there is no reason to suspect that, being in collusion with either party, he is wilfully delaying matters or that in any other way there is bad faith in his conduct, the Court should always grant reasonable extension. **Mussammat Ram Kaur v Seth Multani Chand.**

29 P L R 1910=8 Ind Cas. 224.

1764.—C P C O X r 8 of 1908=1882 S. 102—Party interested refused relief.

S sued to establish his claim to certain property, [illegible] the next heir of its former owner, on the death of whose grand-mother the property had been taken possession of by defendant *P* and obtained a decree. Upon this *P* appealed, and while the case was under appeal *S* sold his rights to *H*, who [illegible] application to the Court was made a party to the suit. The case was then remanded for further enquiry to the first Court, which dismissed the claim on account of default of both plaintiff and defendant. *H* then applied for opportunity to show that he had not been in default, but his application was rejected [illegible] the ground that he was no party to the suit. He then appealed, but the Judge also ruled that he was no party. *Held* that when the case was remanded for retrial some date should have been fixed for the re-hearing, which would have given the parties opportunity to appear and take measures to carry on the suit, and that the Judge's decision must be set aside, *H* having been in reality [illegible] party to the suit. **Haradhun Chuckerbutty v. Protab Narani Chowdry.** **14 W R 401.**

1765.—C P C O 9 r 8 (1882 S. 102) — Absence of appellant—Dismissal of appeal.

Where the respondent appears but the appellant does not, the Court has no power to decide the appeal [illegible] its merits. The proper course is to dismiss the appeal under S. 102 of the Civil Procedure Code 1882. **Sakharam v Naro.**

7 Bom L [illegible] 933.

(17) Whether appeal lies-Suit struck off for default.

1766.—C P C O 9 r 8 of 1908=1882 S. 102.—Appeal Civil Procedure Code 1859 ss. 114, 119.

C P C (1908) O. 9 r. 8= 1882, S.102) -*Contd.*

(17) Whether appeal lies-Suit struck off for default—*Contd.*

In a case struck off for default, if the order has been properly made under Act VIII of 1859, s. 114, the remedy is, by motion under s. 119; if improperly made, it is open to appeal. **Uluck Monee Chowdhrain v Panch Coomar Chunder Chowdhry.** **21 W R 124.**

Notes:—Ref 1 C W N 55 1 All 317 F B.

1767—C P C O 9 rr.8, 9. s 104, O.43 r 1 (=ss 103, 102, 588 (8) C P C 1882).—Suit dismissed for default—Appeal from order of dismissal—For an application under s. 103 of the Civil Pro. Code, a period of 30 days from the date of the order dismissing the suit, is allowed and the Courts have no alternative other than dismissing the application, if not presented within that period, but this does not affect the appeal from the original order dismissing the suit, which has the force of a decree. **Sahib Ditta v Roda, 83 P R 1902.**

1768.—C P C O 9 r 8=s. 102, 1882—Dismissal for default—Appeal.

Where a suit is dismissed for default under s. 102 Civ Pro Code an appeal lies. (9 All 427 fol). **Peramanayagam v Arunachella. 1 M L J 385**

1769.—C P C O 9 r 8—Suit dismissed for default—Appeal from order of dismissal—Civil Procedure Code 1882 Sections 2, 102—Revision—Civil Procedure Code 1882 Section 622—" Case " meaning of.

Plaintiff's suit was dismissed by the first Court under Section 102, Civil Procedure Code, and on the following day plaintiff applied for its re-admission, pointing out that he had been present in the Court premises all day, but had gone to the Bar-room to call his pleader, when his case was called on and dismissed for default. The first Court dismissed the application on the ground that no sufficient cause had been shown for the absence, and plaintiff appealed to the Divisional Judge, who, after an inquiry through the first Court rejected the appeal on the ground that the case had been called on twice, first at 12 o'clock and again at 2 or 2-30 P. M, and plaintiff had only accounted for his absence on the second occasion. Plaintiff applied to the Chief Court for revision of the order of the Divisional Judge, and it was contended on behalf of defendant that an application for revision did not lie, inasmuch as the order dismissing the case for default was appealable to the Divisional Court, and thence to the Chief Court on a certificate. The questions referred to the Full Bench were, (i) whether an order of dismissal for default under Section 102, Civil Procedure Code, is appealable as a decree; (ii) whether the word 'case' in Section 622 of the Code means the *whole* case in every instance, or whether definite portion of a case for which a special remedy is provided in the Code, or specific orders in it for which a separate procedure is prescribed, can form the subject of revision under Section 622, and (iii) whether plaintiff had shown sufficient cause for his absence.

Held, by the Full Bench, (i) that an order under Section 102 of the Code is a decree within the meaning of Section 2, and as such is appealable under Section 540; (ii) that the word "case" in Sec. 622 does not necessarily in every instance, mean the *whole* but may mean a particular branch of a case for which an independent remedy, or a different procedure is provided in the Code, and may include an interlocutory order not falling under Sec. 591; and (iii) that the Divisional Judge committed a material irregularity in not accepting the plaintiff's appeal when he found that plaintiff's absence at the time when his case was dismissed in default had been accounted for, on the ground that plaintiff had not accounted for his absence when the case was first called on. **Pandit Ram Kant v Pandit Rajdeo.**
60 P R 1897.

See **also cases under**:—

(1) Appeal—Orders.
(2) Appeal—Decrees.

(18) Cases in execution of decree.

1770.—C P C O 9, r 8 of 1908=1882 S. 102.

The judgment debtors having appeared and raised objections to the execution of a decree, the Court after investigation proceeded to pass judgment in the absence of the decree-holder. *Held* that the action of the Court was taken under s. 114 Code of Civil Procedure, and that the decree-holder had no right of appeal, but if aggrieved might apply for a re-hearing. **Kalee Kristo Thakoor v Mahomed Kadar.**
12 W R 428.

1771.—C P C O 9 rr 8, 9 s. 104, O 43 r 1 (1882 ss. 102, 103, 588)--Order under s. 102 whether a decree and appealable as such.

C P C (1908) O. 9 r. 8=(1882,S. 102) *-Contd.*

(18) Cases in execution of decree--*Contd.*

An order under s. 102 C P C dismissing a suit is as much a decree as an order under any other section deciding a suit. The order comes within the definition of a decree and is appealable as such. (9 All 427: 1883 A W N 171 followed, 50 Cal 660 *referred to*). **Gosto Behary Sardar v. Hari Mohan Adak.** **8 C W N 313.**

1772.—C P C O 9 r 8, O 17 r 3 (1882 Ss. *102* and 157,)

Appeal from order dismissing plaintiff's case in default-Plaintiff disclaiming to appear on the date fixed for argument—Decree-Dismissal of case in default of plaintiff.

On the date of hearing neither the appellants nor their pleaders appeared. The respondent was present. The lower Court recorded the following order. "It is now I-4 p m.plaintiff's bèing absent, I have nothing for it but to dismiss the suit in default. Plaintiff's claim is dismissed in default with costs" No section was specified in that order. *Held*, that the order of the Court must be held to have been made under s. 157 read with s. 102 of the Code of Civil Procedure, that it was not a decree, not being an adjudication upon any rights claimed, and was not appealable.

Ghazanfar Ali Khan v Asharfi Lal.
5 O C 294.

Notes:—Ref *6* Cal 48; Fol; 10 O C 171.

1773.—C P C O 9 r 8 (1908)=(1882) S. 102. Appeal from decree made under Section 102—Dismissal for default—Scope of such appeal,

A plaintiff who appeals against a decree made under Section 102 of the Civil Procedure Code can only appeal as in the case of a decree made in the presence of both parties, on the ground that the lower Court has erroneously decided some question of law or of fact, or that its procedure has been irregular and not in accordance with law. The plaintiff has no right to impeach such a decree merely on the ground that he had a good execuse for not being present on the date fixed in the lower Court, the proper and the only way in which a decree can be impugned on such ground being by a proceeding under Section 103, a proceeding under which section imputes no error to the Court in making the decree, but alleges new matter as a ground why it should be set aside. **Bhagwan Singh v Pari.**

32 P. R; 1889

C P C (1908) O. 9 r. 8=(1882, S. 102) *-Concld.*

(18) Cases in execution of decree—*Concld.*

Notes:—Ref: 121 P R 1907=51 P W R 1907 Cons; 52 P R 1905=133 P L R 1905 Expl; 12 O C 405.

C P C O 9 r 9=(1882) S. 103.

Notes—This rule corresponds to section 103 of the C P Code, 1882, with some material alterations. The most important change introduced in this rule, is the substitution of the words " *if he satisfies the Court that there was sufficient cause for his non-appearance* " for the words "if it be proved that he was prevented by sufficient cause from appearing" which occurred in the old section. The words " *he was prevented*" which occurred in the old section, meant, if he was obstructed by something unexpected or by some accident, as for instance sudden illness, or stoppage of communication &c,, &c. The meaning of the word " *prevented* " has been clearly explained in 13 Bom. 12. But the present rule has been so framed as to include any cause, which may appear to the Court sufficient; as for instance, the illness of the husband, wife, or any other relation, inability to give instruction to pleader or the absence of the pleader on account of illness &c , &c, may be sufficient cause under the present rule for the restoration of the case, if the Court is satisfied, on the evidence that there was sufficient cause for plaintiff's non-appearance. The present rule is certainly an improvement upon the old section.

The other changes introduced in this rule are mere verbal and not material.

It should be noted here that the same word " *prevented* " which occurred in section 108, C P Code, 1882, (Or. IX, r. 13) has not been changed but retained in rule 13. By the change in the language of this rule, indulgence has been shown to the plaintiff, but by retaining the word " *prevented*" in rule 13, no indulgence has been shown to the defendant applying to set aside an *ex parte* decree.

(1) Applicability and scope. (1774).
(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee. (1775-1790)
(3) Application to set aside dismissal for non-appearance maintainable or not. (1791).
(4) Dismissal of suit for non-appearance of plaintiff. (1792-1994)

C P C (1908) O. 9 r.9=(1882, S. 103) *-Contd.*

- **(5) Adjournment for defendant. (1795-1796)**
- **(6) Appearance of party (1797-1800)**
- **(7) Sufficient cause for non-appearance of plaintiff when suit calfed on for hearing. (1801-1802)**
- **(8) Dismissal of former suit for default —Fresh suit barred. (1803-1806)**
- **(9) Dismissal of former suit for default —Fresh suit-not barred. (1807).**
- **(10) Order striking off suit. (1808)**
- **(11) Dismissal of suit for default. (1809-1810).**
- **(12) Suit brought by next friend of minor and struck off for default of appearance. (1811)**
- **(13) Suit by purchaser of mortgaged land against mortgagee for redemption. (1812-1813A)**
- **(14) Dismissal of former suit for default-Appeal from dismissal orders. (1814-1825)**

See Cases under:—

(1) Res judicata—Judgments on preliminary points.

(2) Specific relief Act, s 9.

(1) Applicability and scope.

1774—C P C O IX r 9—Dismissal of suit in Revenue Court—Applicability of Civ. Pro. Code —U P Act 2 of 1901, ss 193, 197

2 A L J 118.

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee.

1775—C P C O 9 r 9 of 1908=1882 S 103.

Insolvency Act S 7—Applicability of s 370 C P C Code where there is no complete bankruptcy C P Code ss. 102, 103. 157, 370.

S 370 C P Code does not apply where only an application is made to declare the plaintiff an insolvent and a vesting order made but the proceedings are annulled and no such order is made. Therefore when a case has been dismissed for the non-appearance of the plaintiff or the official assignee s 103 C P Code applies.

Amrita Lal Mukerjee v Rakhali Dassi Debi. 27 Cal 217; 4 C W N 294.

1776—C P C O 9 r 9 ss 99, 195 (=Civ. Pro. Code, 1882, ss 103. 574, 591) —Objection to re-opening a case not having been taken in Original Court, point cannot be raised in Appellate Court.—

C P C (1908) O 9 r 9=(1882, S. 103) *-Contd.*

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee *—Contd.*

An order under s 103, Civ. Pro. Code, [illegible] not [illegible] order affecting the decision of a case within the meaning of [illegible] 591 Civ. Pro Code, 1882. (22 Cal 981 ref).**Shewdatroy Bhissasur Dass v Molla Tar. U B R 1897—1901, Vol. II. 237.**

1777—C P C O 9. r 9=Ss. 103 and 647—Application for revision—Dismissal for default—Power of Court to restore the application,

Where an application for revision is dismissed for default of the petitioner, such petition can be restored by the Court under S.103.C P C. by virtue of the provisions of S 647 of the Code. 109 P R 1882, Diss 76 P R 1903; 75 P R 1881; 54 PR 1901 (F B); 14 Cal 177; 62 [illegible] R 1894. Ref and Dist.). **Jiwani v.Bhagel Singh. 97 P R 1907=33 P L R 1908.**

1778—C P C O 9. rr 9, 8=S. 151—Dismissal of suit for default--Restoration—Sufficient cause —Court's inherent power to restore.

Nothing in the Code of Civil Procedure can limit or otherwise affect the inherent powers, under which [illegible] Court can restore a suit dismissed for non-appearance, [illegible] grounds other than sufficient cause for non-appearance. O 9 r 9 of the Code, makes it compulsory on [illegible] Court to set aside a dismissal under Rule 8, where the plaintiff satisfied the Court that there was sufficient cause for non-appearance. It, however, cannot take away the Court's power to restore the case for any other valid reasons.

Lalta Prasad v Ram Karan. 9 A L J 666.

1779—C P C O 9 r 9(=S 103, Civ Pro Code 1882) if applies to probate proceedings-Probate and Administration Act (V of 1881), s. 83—Dismissal of application for probate for default—Executor if may propound will again—Res judicata—Deterrent costs sufficient remedy against vexatious conduct.

A refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. But if probate has been refused, not on the merits, but merely by reason of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to pro-

C P C (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee —*Contd.*

bate, and therefore, it may be again propounded. If therefore, [redacted] application for probate by the executor of a Will has been dismissed for default, that fact itself cannot debar an application by any other person claiming [redacted] interest under the will, and therefore, necessarily also, by the executor himself. An executor presenting [redacted] application for probate of a Will cannot be regarded as a plaintiff who brings a suit in respect of [redacted] cause of action. S 103 of the Civ. Pro Code, (Act XIV of 1882), would therefore be in terms inapplicable to such [redacted] application. (21 Bom 563. Rel. on). **Ramani Debi v. Kumud Bandu Mookerjee. [redacted] C W N 924=7 Ind Cas 126=12 C L J 185.**

1780—C P C O 9 r 9=(1882 S 103.)

Applicability—Plaintiff in former suit not plaintiff in the latter suit—Limitation Act (XV of 1877,) Act, 120—Right to sue arises when cause of action is complete —Knowledge or ignorance immaterial in the absence of fraudulent concealment-Suit by junior members of tarwad-Limitation.—

Suit for declaring that [redacted] lease granted by the *karnavathi* was not binding [redacted] the tarwad and for other reliefs. A previous suit had been brought by some other members of the Tarwad to question the validity of another lease executed by *karnavathi*, and it had been dismissed for default. The plaintiff in the present suit was the 7th defendant in that suit.

Held, that the suit was not barred by s, 103 C P C inasmuch as the plaintiffs in the previous suit are not the plaintiffs in the present suit. S. 103 cannot apply to a case, unless the plaintiffs in the prior suit are also plaintiffs in the subsequent suit, or unless the plaintiff in the latter suit can be regarded as having been also [redacted] plaintiff in the former.

Held that, inasmuch as the present plaintiff was not only a defendant, but a contesting defendant in the previous suit, the present plaintiff cannot be held to have been represented by the plaintiffs in the prior suit.

A suit for declaration that an alienation by the karnavan of tarwad property is not binding on the tarwad is governed by Art. 120. In the absence of fraudulent concealment, the knowledge or ignorance of the plaintiff in regard to the alienation questioned is not material.

C P C (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee —*Contd.*

The right to sue accrues [redacted] soon as the cause of action is complete *i e* on the date of the alienation. (11 Mad 378 Fol.) **Ottappurakal Thazhate Soopi v Cherichil Pallikal Uppathumma 33 Mad 31=5 Ind Cas 698.**

1781—C P C—O. 9 r. 9=(1882 S. 103).

Applicability to Execution Proceeding.-S. 103 C. P. C. has no application to execution proceeding **Madon Mohen Mondul v Baikanta Nath Mondul. 10 C W N 839.**

1782—C P C—O. 9 r. 9=(1882 S. 103).

—Dismissal of suit for default—Ground for dismissal order being set aside.—

The only ground on which, [redacted] order of dismissal of [redacted] suit for default, can be set aside in pursuance of the law as laid down in s. 103 of the Code, is that of the plaintiff's being prevented by any sufficient cause from appearing when the suit was called [redacted] for hearing. **Lakshmanan Chetty v Yellayappa Chetty. 4 L B R 221.**

1783—C P C—O. 9 r 9=S. 103—Presidency Small Cause Courts Act—Dismissal for default.

D instituted a suit in the Presidency Small Cause Court at Bombay in the capacity of a *munim* or recognized agent of *K*. When the case was called on, it appeared that D was not a *munim* of K, and hence he could not appear for *K*. The learned third Judge dismissed the suit for default. K thereupon filed another suit on the same cause of action and it was contended on behalf of the defendant that K was precluded from bringing a fresh suit under S. 103, Civil Procedure Code, 1882. The learned fifth Judge adopting this view dismissed the suit.

Held, reversing the order, that S. 103, Civil Procedure Code, 1882, did not apply to the case, because the plaintiff in the former suit was obviously not the plaintiff in the second suit. **Kanji v Habib. [redacted] Bom L R 206.**

1784—C P C—O. 9 r. 9=(1882) s. 103—Suit dismissed by default—Application for review made more than 30 days after date of dismissal—Limitation Act, 1877,—Second Schedule, Article 163.

In a suit instituted by petitioner, the defendant was summoned for, and duly appeared, on the 11th May 1894, but petitioner himself did

C P C (1908) O 9 r 9=(1882, S. 103) –Contd.

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee —Contd.

not appear. As the claim was denied, petitioner's suit was dismissed by default, and on the 2nd July 1894, petitioner applied for review of judgment, without, however, being able to show that the order attached was other than the only order which the Court could have passed under the circumstances.

Held, that Article 163 of the Second Schedule to the Limitation Act, 1877, applied, and that the application was barred thereunder. **Nur Muhammad v Dina.** **15 P R 1897.**

1785—C P C—O. 9 r. 9=(1882 S. 103).

Application for restoration—Limitation Act, Art. 163—Vacation.—

A plaintiff's application for restoration of a suit under s. 103 C. P. C., must be made within 30 days from dismissal. The application must be made or mentioned within such period and mere notice of the motion would not prevent limitation from running. (20 Cal 899 foll). Further, if a vacation intervenes, so that the application cannot be made within 30 days, then to prevent the application from being barred it must be made or mentioned on the very day the Court re-opens and not on the first motion day.

Hinga Bibee v Maunna Bibee. **8 C W N 97=31 Cal 150.**

Notes—Ref: 11 C W N 329 F B. Diss: 17 M L J 215. Ref: 34 Cal 403 F B; 5 C L J 247 F. B. 10 Bom L R 904.

1786—C P C O. 9 r. 9=Section 103—Execution of decree—Attachment-Objections to attachment dismissed for default—Power of Court to restore such application to the file.

Held, that the procedure prescribed for original suits by the Code of Civil Procedure does not apply to execution proceedings under Chapter XIX, and accordingly the remedy provided by Section 103 of the Code is not open to an objector whose objections under Section 278 to an attachment of certain property in execution of decree owing to his absence on the date fixed for hearing have been dismissed in default.

Coates v Kashi Ram. **76 P R., 1903.**

1787—C P C O. 9 r. 9=(1882 r. 103).

Applicability-"Sufficient cause"-Land Acquisition Act— Proceedings.—

S. 103 of C. P. C applies to a reference under s. 30 of the Land Acquisition Act, the party at whose instance the reference was obtained occupying the position of the plaintiff and opponents that of defendants. (7 C W N 249, 30 Cal. 36 and 25 All. 133 approved). Where the pleader engaged by the former could not attend owing to his wife's illness, and another gentleman who had agreed to take up the case as his substitute was unavoidably prevented from attending the Court and there being three cases on the day's list above the Case, the party himself did not anticipate that the case would be called at an early hour and [illegible] failed to be present with his witnesses at the time when the case was called. *Held*, that these facts combined made out a case of sufficient cause for the re-admission of the case, but only subject to conditions. The case was restored on condition of the defaulting party (appellant) paying beforehand to his opponents the costs of the hearing on the day on which the case was dismissed, the subsequent costs of the application under s. 103 C. P. C., and the costs of the appeal before the High Court. **Behary Lal Sur v Nanda Lal Goswami.** **11 C W N 430.**

1788—C P C—O. 9 r. 9=S. 103—Pleader—Non-appearance—Sufficient cause.

Where a pleader could not attend owing to illness and had no time to communicate with the client or to make fresh arrangements, *held* that this was sufficient cause for non-appearance though the case was fixed peremptorily for that day. **Shrimant v S Smith.** **1896, P J., 422.**

1789—C P C—O. 9 r. 9; r. 13; O. 41 r. 19, =(1882—Ss. 103, 108, 558).

Restoration—Dismissal on default—Power of Courts to restore when no "sufficient cause" shown: —Effect of Ss. 103, 108 and 558—When appearance was prevented by a sufficient cause, the Court has no discretion in the matter under the Code and must restore the case to file whatever may *prima facie* be the merits of the suit or defence thereto, but where there may be other just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its judicial discretion. It is competent to, but not obligatory upon the Court to restore the case to file even when no sufficient cause for non-appearance is shown. **Somayya v Subbamma.** **26 Mad 599.**

C P C (1908) O 9 r 9=(1882, S. 103) -Contd.

(2) Dismissal of the suit for non-appearance of plaintiff or of the official assignee —Concld.

Notes.—Ref: U B R 1909, 2nd Quarter Civ. Pro. Co. 27=121 P. R. 1907=51 P W *R* 1907; 46 P R 1905=173 P L R 1905; 72 P R 1905=159 P L R 1905; 30 Mad 374: 17 M L J 226; 32 Bom 534=10 Bom L R 301. Not Fol: 10 Bom L R 904. Donbted—9 Bom L R 319.

1790—C. P. C. O. 9, r. 9 (=s. 103, *Civ*. Pro. Code, 1882)—Dismissal for default—Grounds for restoration—Plaintiff's absence contumacious.

Assuming that, apart from the sufficiency or otherwise of the cause preventing a plaintiff from appearing in Court when his suit is called on for hearing, a Court may restore a suit dismissed for default of appearance, on a suitable order as to costs, looking to the importance of the cause, to the high value of the property involved and the persistence with which the litigation is conducted by the plaintiff, (26 Mad 599, Ref.), if the non-appearance was due only to some trifling neglect or to ignorance of the consequences of his action in not appearing; but a Court will not order a restoration when the plaintiff's absence was wilful and contumacious and amounted to a refusal to submit himself to the jurisdiction of the Court. Counsel's appearance in Court on instructions only to apply for an adjournment, is no appearanee for the purposes of the conduct of the suit. (25 Bom 417; 31 Cal 150 Ref.). **Gurdit Singh v Sohan Singh.**

46 P R 1905=173 P L R 1905.

(3) Application to set aside dismissal for non-appearance maintainable or not.

1791—C. P. C. O. 9 rr. 9;8; O. 17 rr. 2; 3 =(1882 Ss. 103; 102; 157 and 158).

Adjourned hearing—Default—Dismissal—Restoration.

A, the plaintiff in a suit, took out processes against his witnesses; they did not, however, though served, appear on the adjourned date fixed for trial. The pleader for the plaintiff prayed for the issue of warrant for the arrest of one of them. This was refused. The pleader then intimated that he had no further instructions to appear in the suit which was thereupon dismissed.

Held, that the dismissal was not under S. 158 of the Code, but was under S. 157 read with S. 102 of the Code. It was, therefore, competent to the plaintiff to apply under S. 103 of the Code, to have the order of dismissal set aside.

C P C (1908) O. 9 r. 9=(1882, S. 103) -Contd.

(3) Application to set aside dismissal for non-appearance maintainable or not-*Concld.*

Scope of Ss. 157 and 158 of the Code, explained. If there are no materials on the record at an adjourned date of hearing the Court ought to proceed under s. 157 of the Code. If, however, there are materials, the Court ought to proceed under s. 158 of the Code. **Marian-Nissa alias Doman Bibi v Ramkalpa Gorain.**

5 C L J 260=34 Cal 235.

Notes;—Fol 36 Cal 189. Comp: 19 M L J 760. Ref: 5 Ind Cas 499.

(4) Dismissal of suit for non-appearance of plaintiff.

1792—*C* P C O 9 r 9 of 1908=1882 s. 103 -Application under s. 103-What is not appearance exparte decree.

On the day of hearing plaintiff's counsel applied for a postponement, which was refused and as the counsel had no further instructions he left the court. The suit was dismissed for want of prosecution. Plaintiff applied under s. 103 for an order setting aside the dismissal. *Held* refusing the application that, the above circumstances amounted to an appearance on the part of the plaintiff. **Rampertab Mull v Jakeeram Agurwallah.** **23 Cal 991**

Notes.—Ref: 5 C L J 247 F B ; 11 C W N 329 F B ; 34 Cal 403 F B.

1793—C. P, C. O. 9 r. 9: O. 16 r. 4=(1882 Ss. 103, 155).

Application for adjournment, refusal of—Application to restore——Non-appearance. A Case was on the peremptory list. On the morning of the day it was likely to be called on, plaintiff's counsel appeared and asked for a postponement which was refused. Later on, on the same day, when the case was called on, another counsel appeared and renewed the application for postponement. The Court refused the application and asked him to proceed with the case, but counsel stated that he had no instructions to go on with the case.

The Court thereupon dismissed the suit. *Held* that an application for restoration of the case fell within s. 103 of the Civil Procedure Code and not within. s. 155. **HingaBibee v Mauna Bibee.** **31 Cal 150=8 C W N 97.**

Notes:—Ref: 11 *C* W N 329 F B. Diss: 17 M L J 215. Ref: 34 Cal 403 F B: 5 C L J 247 F B; 10 Bom L R 904.

C P C (1908) O 9 r 9=(1882, S. 103) *-Contd.*

(4) Dismissal of suit for non-appearance of plaintiff—*Concld.*

1794—C. P C. O. 9, rr. 9,8=(1882 ss. 103, 102) —Representative of deceased plaintiff, application by, for order to set aside dismissal of suit.

Held, that S. 103 of the Code of Civil Procedure may be construed as permitting a representative to apply at one and the same time for the substitution of his name in place of that of the deceased and for order to set aside the dismissal of the suit. **Ram Pyare v Rup Narain 6 O C 34.**

Notes:—Ref. 9 O. C. 35.

(5) Adjournment of defendant.

1795—C P C O 9 r 9 of 1908=1882 s. 103.—Default by plaintiff—Dismissal of suit—Application to restore suit—Civil Procedure Code, s. 158

Where a suit was adjourned at the request of the defendant, and on the day to which the case was adjourned the plaintiff was absent and the defendant was present and the suit was dismissed not on merits but for the Judge should hear the application under S. 103 of the Code for default by an order for purporting to be passed under s. 158 of the Code of Civil Procedure, 1882. —*Held* that s. 158 was not applicable to the circumstances. **Venkata Ramaya Apparau v Ahumukunda Rangaya Nayudu, 7 Mad 41.**

1796—C. P. C. O. 9 r. 9 (1908)=S.103 (1882).

The pleader of the plaintiff having presented an application under S. 103 for setting aside the dismissal of the suit under S. 102, the Sub-Judge thought the pleader was not competent to make the application; therefore the plaintiff himself presented a similar application which was granted. On appeal the District Judge reversed the order of the Sub-Judge on the ground that the plaintiff's application was beyond time.

Held, that the pleader was competent without a fresh vakalutnama to make the application, and that application being in time the Sub-Judge's mistake in requiring the plaintiff to present the second application which was unnecessary cannot be allowed to prejudice the plaintiff, even though he did not formally appeal at the time against the order on his pleader's application. **Narayan v Narayan. 1890 P J 124.**

(6) Appearance of party.

1797—C. P. C. O. 9 r. 9 of 1908=1882 S. 103. Appearance by pleader or recognized agent—Appearance only for purpose of applying for adjournment—Civil Procedure Code (Act XIV of 1882), s. 100—Presidency Small Cause Court Act (XV of 1882). s. 38—Dismissal for default—Remedy of plaintiff.

A suit and cross-suit between the same parties were on the board of a Judge of the Small Cause Court for hearing on the 23rd April 1898. On that day A, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and B, another counsel, held his brief and appeared on his behalf and applied for two months' adjournment of both suits. The munim of his clients was then in Court. [illegible] was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and B said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, application was made for a re-hearing of both suits. The Court, regarding the decrees as ex-parte decrees, granted a rule for a new trial, which was made absolute. On appeal to the Full Court, the matter was referred to the High Court. *Held* that under the circumstances the suits were to be considered as having been disposed of under ss. 100 and 102 of the Civil Procedure Code respectively, and that, whether or not they, or either of them, fell within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act, the remedy under s. 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit. Where on the day fixed for hearing a party is present in person merely for the purpose of applying for an adjournment which is refused, he must be taken to have "appeared" within the meaning of Chap. VII of the Civil Procedure Code. The party has appeared in person. The purpose for which he appeared or the action which he took on appearance, are immaterial. But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions and whose functions are at an end when the adjournment is refused, in that case the party has not appeared within the meaning of the chapter. Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes

(6) Appearance of party—*Contd.*

any application nor does any act, the question is whether he intends to appear and in fact does appear for the party in the exercise of his powers under s. 36 of the Civil Procedure Code. That section is merely permissive and enabling. If the recognized agent, although able to do so, does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an appearance in the suit. An appearance may be made by a pleader or a recognized agent but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal the latter is unrepresented. S. 38 of the Presidency Small Cause Courts Act does not preclude a plaintiff whose suit has been dismissed for default from applying under s. 103 of the Civil Procedure Code to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under s 38, he must do so within eight days. If he professes to apply for an order setting aside the dismissal under s 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act, XV of 1877 sch II, art 163). **Soonderlal v Goorprasad** **23 Bom 414.**

1798—C P C O 9 rr 9, 8; S. 47; O 21 r 90; S. 141—(1882 S. 103, 102, 244, 311 and 647).

Application to set aside sale—Dismissal for default.

Where an application under Ss. 244 and 311, C P C (1882), for setting aside an execution sale is dismissed for default, the applicant is precluded from making a fresh application of the same nature, without making an application under sections 102 and 103, to set aside the order of dismissal. S. 647 of the Code applies to an application under Ss. 244 and 311. (17 All 106 (P C) =22 I A 44).

Abdur Rahman Mullick v Khorban Mullick Matwali. **2 Ind Cas 156.**

1799—C P C—O 9, rr. 9, 8 (=ss. 103, 102, Civ Pro Code. 1882)—Dismissal of suit—Plaintiff's pleader present but none of the plaintiff's witnesses.

(6) Appearance of party—*Contd.*

Where, on the day fixed for the hearing of a suit, the plaintiff's pleader appeared, but, in consequence of none of the plaintiff's witnesses being present, was unable to support the plaintiff's case and the suit was consequently dismissed, *held* that this was not a dismissal for default of appearance and did not entitle the plaintiff to apply under s. 103 of the Civ Pro Code for rehearing. (16 Bom 23, 8 All 140, 13 Cal 605, Ref.). **Fazal Ahmed v Bahadur Singh. A W N 1893, 25.**

Notes:—Dist: 18 All 241=A W N 1896, 47.

1800—C P C—O 9 rr 9 : 8; O 17, r. 2; S. 115 (1882—Ss. 103, 102, 157, 622). Suit part-heard—Adjourned date-Plaintiff and his pleaders absent—Order dismissing suit—Decree—Appeal—Mistake of Judge as to legal powers—Failure to exercise a jurisdiction—Interference of High Court under S. 622—Mandamus for not using discretion.

An order dismissing a suit for default of appearance of the plaintiff and his pleader is not a decree and is, therefore, not appealable. (32 Mad 221 foll). Where a suit is part-heard and is adjourned and the plaintiff and his pleader do not appear at the adjourned date of hearing, the proper procedure is that laid down in S. 157, C P C and not that laid down in Sec. 102, C P C. Under S. 157, C P C the Judge may either dismiss the suit for default under s 102, C P C or pass such other order as he thinks fit. Where, therefore, the plaintiff, a minor brought a suit against the defendants upon a mortgage and the suit being part-heard was adjourned to another date and the plaintiff's pleaders came late, and when the case was called on, neither the plaintiff nor his pleaders were present and the Judge, thinking that he had no other alternative than to pass an order of dismissal, immediately dismissed the plaintiff's suit: —*Held*, (1) that S. 157, C P C, applied to the case under which the Judge had the option of dismissing the suit or passing any other order he may think fit. (2) That the Judge was right in dismissing an application under s. 103, C P C as there was negligence on the part of the plaintiff's pleaders, (3) That the judge was wrong in thinking that he had no other alternative under the law than to dismiss the suit. (4) That by a mistaken notion as to his legal powers, he failed to exercise a jurisdiction vested in him by law

C P C (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(6) Appearance of party-*Concld.*

and, therefore, the High Court could interfere under s. 622, C P C. **Maharaja of Vizianagaram v Lingam Krishna Bhupati. 12 M L J 473.**

Notes—Fol: 8 M L T 60=20 M L J 535=6 Ind Cas 233=M W N 1910, 215. Ref: 121 P R 1907=51 P W R 1907 F B.=34 Cal 235=5 C L J 260.

(7) Sufficient cause for non-appearance of plaintiff when suit called on for hearing.

1801—C P C O 9 r 9 of 1908=1882 s. 103—Application to set aside order of dismissal made under s. 102.

The plaintiff duly attended the Court [illegible] the day fixed for the hearing of his case, and waited for some time, as the Judge happened to be sitting on that date at first in the Appeal Court. Believing that when the Judge took his seat in his own Court a part-heard case would be proceeded with and would occupy some time, the plaintiff left the Court-house and went to assist his employer, who had sent for him to explain some matters connected with a mercantile transaction. The plaintiff returned to the Court in about half an hour, and found that in his absence his suit had been called on for hearing and dismissed under s. 102 of the Civil Procedure Code. On application under s. 103 to set aside the order of dismissal,—*Held*, refusing the application, that the above circumstances did not amount to "sufficient cause" for his non-appearance when his suit was called on for hearing. He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty cause. He accepted the risk of his being called in his absence. **Munilal Dhunji v Gulam Husein Vazeer 13 Bom 12.**

Notes:—Ref: 23 Cal 991. Fol: 10 Bom L R 904.

1802—C P C O 9 r 9=(1882 S. 103)—Suit—Default of appearance—No appearance by counsel—Dismissal for default—Sufficient cause for default.

When a suit was called on for hearing neither of the plaintiff's counsel was present but the plaintiff

C [illegible] C (1908) O 9 r 9=(1882, S. 103) —*Contd.*

(7) Sufficient cause for non-appearance of plaintiff when suit called on for hearing—*Concld.*

was present in person. However, to enable them to come and appear the defendant's counsel raised issues in the case. At the end of that time the Court gave time for the plaintiff to appear. The plaintiff's counsel did not turn up within the time allowed whereupon the suit was dismissed. The plaintiff then applied under S. 103 of the C P C for the restoration of the suit. *Held*—That there was no sufficient cause for setting aside the order of dismissal. (13 Bom 12 foll. 26 Mad 599 not foll). **Esmail Ebrahim v Haji Jan Mahomed. 10 Bom L R 904.**

(8) Dismissal of former suit for default—Fresh suit barred.

1803—C P C O 9 rr 9, 8=(Ss.103 102)—Dismissal for default, effect of—Hindu Law—Mitakshara-Son's right to resist execution against joint family property of decree against father and afterwards suit for injunction dismissed for non-prosecution, effect of:

Dismissal of [illegible] suit under S. 102, C P C does not operate as *res judicata* in favour of the defendant. (L R 15 I A 156, s c 16 Cal 98 ref to.) But read with S. 103 it precludes [illegible] fresh suit in respect of the same cause of action. Where a suit for injunction to restrain the sale of joint Mitakshara family property in execution of a decree against the father on the ground that the debts of the father did not bind the son's interest in the property was dismissed for non-prosecution: *Held*—that the son was no longer entitled to contend in execution proceedings that the entire property was not liable to be sold. (17 Bom 718 (1893)) A decree-holder against a Mitakshara father can proceed against the entire joint property. (L R 1 I A 321; L R 13 I A 1; s c 13 Cal 21; 24 Bom 343; s c 3 B L R 322 foll. 2 Bom 676; 5 Bom 493; 10 Bom 363 dist.) **Sankar Nath Pandit v Madan Mohan Das. 14 C W N 298**

1804—C P C O 9 r 9—Suit—Hindu widow—Dismissal for default—Subsequent suit by reversionary heirs.

Held, that when a suit brought by a Hindu widow in relation to her husband's estate is dismissed under section 102 of the Civil Procedure Code, the order of dismissal does not under Section 103 of the Code, bar a fresh suit by the reversionary heirs of her husband in respect of the

C P C (1908) O 9 r 9=(1882, S. 103) —*Contd.*

(8) Dismissal of former suit for default —Fresh suit barred—*Concld.*

same cause of action. **Viru Mal v Mussammat Bhagwandevi. P [illegible] 80 of 1884.**

Notes.—Ref: 117 P R 1891; 139 P R 1888.

1805—C P C O 9 rr. 9 and 8 (=ss. 103, 102, C P C 1882)—Suit for redemption dismissed for default—Fresh suit for the same barred.—

If [illegible] mortgagor sues for redemption and his suit is dismissed under s. 102, Civ. Pro. Code, and he, thereafter, brings a fresh suit for redemption of the same mortgage, the cause of action in the second suit is the same as the cause of action in the first and is barred by s. 103 of the Civ. Pro. Code. (15 Cal 422, P C; 117 P R 1891; 32 P R 1905, Fol: 10 Bom 28, Dist: 25 Mad 30, F B; 7 Bom 467; 13 Bom 567; 19 All 202, Appr: 86 P R 1877, 14 P R 1881, 6 Mad 119; 7 Mad 432; 11 All 386; 15 Mad 366, Doubted). **Gurditta v Narain Das. 43 P R 1907=169 P L R 1908.**

Notes:—Ref: 73 P R 1908.

1806—C P C O 9, r. 9=Civil Procedure Code, 1882, Section 103—Suit dismissed under Section 102, where defendant only appears—Meaning of the word " plaintiff ".—

In Section 103, Civil Procedure Code, 1882, which enacts that when a suit is wholly or partially dismissed under Section 102 (that is, in the presence of the defendant and in the absence of the plaintiff), the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, the word " plaintiff " must be held to include the plaintiff's heirs and representatives in interest, who cannot claim any better position as regards the maintenance of the second suit than the person through whom they claim. (80 P R 1884, and 15 Cal 423, referred to.) **Mamraj v. Chandwa Mal. 117 P R 1891.**

Notes:—Ref: 43 P R 1907.

C P C O. 9, r. 9—See Ex parte decree.

C P C O. 9, r. 9—See Mortgage — Redemption.

(9) Dismissal of former suit for default —Fresh suit not barred.

1807—C P C O 9, r 9 (1908)=S. 103 (1882).

The plaintiff bought from L an estate which L had purchased from G. L sued G for confirmation of possession, and that suit was dismissed for default. The plaintiff's purchase was made pending that suit. In a suit for possession on the allegation of dispossession, — *Held*, that the plaintiff's suit was not, under s. 144 of Act VIII of 1859, barred by the former decision against L.

Mahabir Prasad v. Lala Ram, 5 B L R 327 note=11 W R 193.

(10) Order striking off suit.

1808—C P C O 9 r 9 of 1908=1882 S. 103=S. 144 of C P C of 1859.—

An order made in a suit " number kharij or struck off" is not a passing of judgment against the plaintiff by default under s. 114, Act VIII of 1859, precluding him from bringing a fresh suit in respect of the same cause of action.

Khoob Lall Singh v. Toolsee Singh, 17 W R 219.

Notes:—Dist: 9 C W N 584.

(11) Dismissal of suit for default.

1809—C P C O 9 r 9=S. 103—Difference in cause of action—C P Code, Ss. 13, 102, 103.—

Dismissal of a suit under S. 102 does not operate as *res judicata*. S. 103 precludes a fresh suit in respect of the same cause of action, referring entirely to the grounds on which the plaintiff asks the Court to decide in his favour. *Held*, that where the causes of action in the two suits are not identical, a fresh suit is not precluded by S.103 C P Code. **Chand Kour v Partab Singh, 16 Cal 98=15 I A 156.**

Notes:—Appl: 15 All 359; 25 Mad 736. Ref: 21 Mad 153; 22 Mad 221; 8 M L J 92; 18 All 131; 432; 27 Mad 588: 6 C L J 362.

1810—C P C O 9. rr. 9, 8 (1909)=(1882) Ss. 103, 103—Res judicata — Civil Procedure Code (Act X of 1877), Sections 102, 103—Dismissal of suit—Non-appearance of plaintiff—Effect of such dismissal—Suit for injunction—Suit to set aside gift—Cause of action.—

The dismissal of a suit in terms of Section 102 of the Civil Procedure Code for the plaintiff's non-appearance does not operate in favour of the defendants as *res judicata*, though it precludes the plaintiff whose suit has been dismissed from

C P C (1908) O 9 r 9=(1882, S. 103 -Contd.

(11) Dismissal of suit for default-*Concld.*

bringing a fresh suit in respect of the same cause of action.

A. and B. who were agnates of K. sued K's widow for an injunction restraining her from alienating the property of K. in her possession, but the suit was dismissed under Section 102 of the Civil Procedure Code on account of the non-appearance of the plaintiffs. The widow afterwards executed a deed of gift to P, who was a stranger to the succession of the fee of K's estate, and A. and B. with two other agnates of K. sued the widow and K. for a declaration that the deed of gift did not affect their reversionary rights.

Held, by the Privy Council, that the dismissal of the first suit was not a bar to the second suit.—**Mussammat Chand Kour v. Partap Singh, 177 P R 1888.**

(12) Suit brought by next friend of minor and struck off for default of appearance.

1811—C P C O 9 rr. 9, [illegible] of 1908=1882 S.103 & 102—Suit by a next friend of a minor struck off for default—Gross negligence on the part of the next friend—Equity—C P Code, S. 103.—

A suit was brought by a next friend of a minor, and through the gross negligence of the next friend in the conduct of the suit it was dismissed for default. The person under disability brought a second suit on the same cause of action after his disability has ceased. His second suit was not barred by s. 103 C. P. Code. The English rule of law on this point being the law of equity and good conscience is applicable to such cases in the absence of statutory provision. **Lalla Sheo Churn Lal v. Ramnandan Dobey, 22 Cal 8.**

See Hanmantappa v. Jivubai, 24 Bom 547.

Notes:—Dist: 5 Bom L R 176. Ref: 19 Bom 571; 24 Bom 547; 3 C L J 119; 6 C L J 448; 10 C L J 420; 13 C W N 1197.

(13) Suit by purchaser of mortgaged land against mortgagee for redemption.

1812-C P C O 9 r 9 (1908)=S. 103 (1882).-

Section 103 of the Civil Procedure Code should be construed strictly. Suit for specific performance of sale of property held not barred by a previous suit between the same parties to redeem it, the cause of action being different. **Kesu bin Shivram v. Vithu bin Kanji, P J (1885), 58=10 Bom 28.**

Also, **Ramchandra Jivaji Tilve v. Khatal Mamomed Gori, 10 Bom 28.**

C P C (1908) O 9 r 9=(1882, S. 103) -Contd.

(13) Suit by purchaser of mortgaged land against mortgagee for redemption—*Concld.*

1813—C P C O. 9 r 9=(1882 S. 103)—Partition—Joint property — First suit dismissed for default—Second suit, maintainability of.—

The right to inforce a partition is a legal incident of a joint tenancy, and so long as such tenancy subsists, any of the joint tenants may apply to the Court for partition of the joint property. (13 All 309. Ref:)

Held, therefore, where the first suit for partition was dismissed for default of appearance, a second suit for the same relief would lie. **Bisheshar Das v Ram Parshad, 3 A L J 379=A W N (1906), 142=28 All 627.**

1813A—C P C O 9 r 9=(1882) S. 103—Dismissal for default — Grounds for restoration—Plaintiff's absence contumacious.

Assuming that, apart from the sufficiency or otherwise of the cause preventing a plaintiff from appearing in Court when his suit is called on for hearing, a Court may restore a suit dismissed for default of appearance, on a suitable order as to costs, looking to the importance of the cause, to the high value of the property involved and the persistence with which the litigation is conducted by the plaintiff if the non-appearance was due only to some trifling neglect or to ignorance of the consequences of his action in not appearing; but a Court will not order a restoration when the plaintiff's absence was wilful and contumacious and amounted to a refusal to submit himself to the jurisdiction of the Court. Counsel's appearance in Court on instructions only to apply for an adjournment, is no appearance for the purposes of the conduct of the suit. **Gurdit Singh v. Sohan Singh, 45 P R 1905.**

(14) Dismissal of former suit for default—Appeal from dismissal orders.

1814.—C P C O 9 r 9 (1908)=(1882) Sections 103, 103, 588 (8)—Suit dismissed for default—Appeal from order of dismissal.

An application under Section 103 of the Civil Procedure Code must be made within thirty days of the date of the order dismissing the suit and the Courts have no alternative to dismissing

C P C (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(14) Dismissal of former suit for default —Appeal from dismissal orders—*Contd.*

the application if not presented within that period but this does not affect the appeal from the original order dismissing the suit such an order having the force of a decree—**Sahib Ditta v Roda** **83 P R 1902.**

1815—C P C O 9 r 9, O 17 r 3 S. 104, O. 43 r 1 (=Civ Pro Code 1882 ss 103, 158, 588)—Application to restore case to file of pending cases—Revision—Appeal.

On an application by the petitioner, purporting to be made under s. 103 of the Civ Pro Code, for restoration of a case to the file of pending cases the Court found that the case in question had been dismissed under s 158 of the Code and on the ground that the order of dismissal was appealable and also rejected the application on the merits. The petitioner then applied to the High Court for revision of the order rejecting his application for restoration. *Held* that, under the above circumstances, an appeal lay from the order in question and, therefore, the application for revision was not entertainable. (19 W R 122; 10 Bom 433 Ref.) **Khadim Husain v. Shankar Lal.** **A W N 1893, 44.**

1816—C P C O 9 r 9 s 141=(1882 ss 103, 647)—Dismissal for default—Application for revision dismissed for default—Application for re-hearing—Sufficient cause—Absence of counsel owing to unusual combination of circumstances.

An application for revision by a parda-nashin lady was dismissed in default of appearance of both the counsel engaged by her for the case on the date fixed for the hearing. An application for re-hearing of the case was made on the ground that the counsel were prevented from appearing by an unusual combination of circumstances. It was objected that the application did not lie, and that there was no sufficient cause for non-appearance of the party at the hearing of the case.

Held, overruling the contentions, that application lay by virtue of ss 103 and 647 of the Civil Procedure Code and that there was sufficient cause for rehearing of the application for revision. **Jivani v Bhagel Singh** **3 M L T 199.**

1817—C P C O 9 r 9; O 17 r 2=(1882—Ss 103, 157)—Revision—Order of restoration Jurisdiction of High Court to interfere in revision.

C P C (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(14) Dismissal of former suit for default —Appeal from dismissal orders—*Contd.*

Per Chief Justice.—An appellate or revisional authority should not lightly interfere with an order of restoration of a case dismissed for default but should do so only upon very strong grounds. *Held.*—That in the circumstances of the case the order of restoration should not have been interfered with, in revision (26 Mad 599 Ref:)

Gopal Row v Maria Soosaiya Pillai,
17 M L J 225=30 Mad 274.

1818—C P C O 9 r 9, O 21 r 90, S 104; O 43 r 1 S 141=(1882 Ss 103, 311, 588 & 647).

No appeal lies against an order rejecting an application, under S. 103 of the Civ Pro Code for reviving an application, under S 311 of the Code dismissed for default. (10 Bom 433, 27 Cal 414, 31 Cal. 207 & 11 Mad 319 Ref.)

Musammat Sobaran Kuar v Ude Sah
10 O C 353.

1819—C P C O 9 r 9, O 21 rr 90, 92, S 104; O 43 r 1=(1882 Ss. 103, 311, 312, 581)—Order refusing to set aside ex-parte order of dismissal of application to set aside sale.—Appeal.

If an application to set aside a sale is dismissed for default and the sale is confirmed the order of confirmation is appealable under cl (16) of S. 588 C P C. But there is no appeal from an order refusing to set aside the *ex parte* order of dismissal of an application to set aside a sale under S 311 of the Code. (27 Cal 414, 31 Cal 207, 29 All 596, A W N (1907) 86 Fol:) **Mrinalini Chowdhurani v Benode Chandra Mitra**
6 Ind Cas 148.

1820—C P C O 9, r 9=(1882, S. 103).—If applies to order rejecting application to revive application under s. 311.

No appeal lies against an order rejecting an application of a judgment-debtor, purporting to be one under sec 103 C P C for the purpose of reviving an application under sec. 311 C P C which had been dismissed for non-appearance of the judgment-debtor. (11 Mad 319, 10 Bom 433, 19 W R 122 (1873), referred to.)

Jang Bahadur v Mahadeo Pershad
8 C W N 160=31 Cal 207.

Notes:— Fol: 29 All 596=1907 A W N 186;
Ref: 3 C L J 276, 10 O C 353,

CPP (1908) O 9 r 9=(1882, S. 103) -*Contd.*

(14) Dismissal of former suit for default —Appeal from dismissal orders—*Concld.*

1821 –C P C O 9 r 9, O 21 r 88; S 104; O 43 r 1 =(1883 Ss 103, 310 and 588).

Appeal-Order refusing to restore application under s 310 dismissed for default. *Held* that no appeal lies from an application under s 310 of the Code of Civil Procedure, which had been dismissed for default of appearance. (31 Cal 207, 10 Bom 433, 11 Mad 319 Fol.)

Ghasiti Bibi v Abdul Samad
A W N (1907) 186=29 All 596.

1822—C P C O 9 r 9 s 99, s 105=(1882 ss 103, 578, 591.)

Assistant Collector refusing to restore suit dismissed for default-Appeal-Order of remand in a case in which no appeal lies—Ultra vires.

No appeal lies from an order of Assistant Collector refusing to restore a suit dismissed in default. If an appeal is preferred and order of remand is passed the remand is *ultra vires*, and proceedings taken thereafter are without jurisdiction.

S 578, clearly indicates that the High Court can in second appeal enter into a question which goes direct to the jurisdiction of the Court. S. 591 of the Code deals with the order which the Court had jurisdiction to make, but in the making of which the Court had committed an error or irregularity. (12 All. 510 Ref.) **Babu Baij Nath v Gajraj Singh 6 Ind Cas 464=7 A L J 675.**

—O 9 r 9. See C P C O 5 r 3 Case No 1604. **A W N 1881, 141.**

—O 9 r 9—Dismissal of suit for plaintiff's non-appearance. **See** C P C O 9 r 8. Case No 1757 **33 Bom 475**

—O 9 r 9—Dismissal of suit for plaintiff's non-appearance.—**See** C P C O 9 r 8. Case No. 1759, **7 Bom L R 261.**

C P C (1908) O 9 r 9. See C P C (1908) S 2. Case No (9). **28 Cal 81**

—O 9 r 9—Rehearing—Execution proceedings. **See** C P C (1908) S 141. Case No (1334) **12 C L J 6.**

—O 9 r 9—Dismissal for default—Successive applications for execution. **See** C P C (1908) S 141. Case No (1333). **13 C L J 532.**

C P C (1908) O 9 r 9=(1882, S 103) -*Concld*

—O 9 r 9.—Whether appeal lies. **See** C P C O 9 r 8. Case No 1771. **8 C W N 313.**

C P C (1908) O 9 r 9. See C P C (1908) S 2, cl 2. Case No (35) **8 C W N 313.**

—O 9 r 9.—Applicability and scope of. **See** C P C O 9 r 9. Case No 1740. **10 C W N 991.**

C P C (1908) O 9 r 9, See C P C (1908) S 2 cl 14. Case No. (54). **31 Mad 157,**

—O 9 r 9—C P C O 17, rr 2, 3. **See** Case No 2101 **5 Ind Cas 23.**

—O 9 r 9.—Dismissal of suit for plaintiff's non-appearance. **See** C P C O 9 r 8. Case No 1747. **5 Ind Cas 499.**

—O 9 r 9—Proceedings to which this section applies. **See** C P C (1908) S 141. Case **No (1331) 3 P W R 1912.**

—O 9 r 9—Adjournment. **See** C P C O 17 rr 2-3. Case No 2100. **1 S L R 224,**

C P C O 9 r 10=S 105, (1882).

Notes:—This rule corresponds to section 105, Civil Proceedure Code, 1882, with some verbal changes only.

C P C O 9 r 11=S 106, (1882).

Notes:—This rule corresponds with section 106 of the C P Code, 1882, with some verbal changes only.

—O 9 r 11—Resjudicata—Miscellaneous. **10 C W N 40.**

1823.—C P C 1908, O 9 rr 11 and 13 (=Ss 106 C P C (1883)—Exparte decree, order setting aside—Order obtained by one defendant, it enures to the benefit of all—Decree, if whole, set aside—Principles governing such cases.

S 108 of the Civ Pro Code, must be read with s. 106, and effect should be given to all the provisions contained in them. It cannot be laid down as an inflexible rule of law, that, whenever an order is made under s 108 of the Code, the effect is to set aside the whole decree, although it may have been made against some of the defendants

C P C (1908) O 9 r 11=1882. S. 106) —Concld

after a contest, or although an unsuccessful effort may have been made by some of the defendants to set aside the *ex parte* decree. It is not obligatory upon the Court to set aside the whole decree and to re-open the entire suit under all circumstances (4 C W N 456, 8 W R 260. Ref: 25 Cal 155, *Exp: and dist*) Principles, which should be supplied in determining whether the entire decree is to be set aside or whether it should be set aside only in so far as it affects the applicant, discussed and explained. **Jadubansa Narain v Mohunt Hari Charan Bharati 6 C L J 226.**

1824.—C P C O 9 rr 11, 13 (=ss 106, 108, Civ. Pro. Code, 1882)—Appearance by pleader—Application for adjournment, refusal-Decree passed, whether ex parte.

Where a vakil is only instructed to make an application for an adjournment, and, on such application being refused, he leaves the Court and takes no part in the hearing of the case, the decree passed is to be regarded as an *ex parte* decree. There is nothing in s 106, which conflicts with or limits the operation of s 108, and the application of the latter section is not limited to the case of a sole defendant who has not appeared, or to the case where there are several defendants, and none of them has appeared.. **G F Cooke v The Equitable Coal Co Ltd, 8 C W N 621.**

Notes:—App: 34 Cal 403=5 C L J 217=11 C W N 329=2 M L T 123.

C P C O 9 r 12=S 107, (1882).

1825.—C P C O 9 r 12 (=Civ.Pro.Code 1882, s 107—Applicability to summoning of party as witness.

S 107 contemplates a summons issued after the persual of the plaint for the first appearance of the defendant in person on the date specified for the hearing, or an order passed at the same time for the personal appearance of the plaintiff on that date. It does not contemplate the summoning of a party as a witness at any stage of the proceedings. **Sheik Wazir v Mt Phulla 6 C P L R 83.**

—O 9 r 12 - See C P C O 5 r 8. Case No. 1601. A W N 1881, 141.

C P C (1908) O 9 r 13=S 108 of 1882.

Notes:—This rule corresponds to section 108 of the C P Code, 1882, with some additions and alterations. The most important changes introduced in this rule are the additions of the words "*as against him*" after the words "setting aside the decree" and the addition of the proviso which is entirely new. The object of inserting the words "*as against him*" has been explained in the following report of the *Special Commitee*: "The Committee has inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been made *ex parte*. There is some conflict of judicial authority upon this point, and the committee think that the matter should be set at rest in this sense."

The object of the insertion of the proviso has been explained in the following report of the *Select Committee*: "We think it necessary to provide, specially for cases in which it may not be possible, to set aside the decree as against the applicant only"

There are conflicting rulings on the point as to whether on the application of one of several defendants against whom a decree has been passed *ex parte*, the entire decree should be set aside or whether it should be set aside only in so far as it affects the applicant; and in order to set at rest those conflicting decisions, the above amendments have been made in this rule. The conflicting decisions have been noted under this section under the heading "*Effect of setting aside an ex parte decree*". The most recent and important decision on this point is the case of 6 C L J 226, in which all the conflicting rulings have been referred to, and the principles, which should be applied in determining whether the entire decree is to be set aside or it should be set aside only in so far as it affects the applicant, discussed and explained. In order to understand clearly the amendments introduced in this rule, the above case should be consulted. The case of 31 Mad 454, also explains the above point.

The word "*defendant*" in this rule includes his representative by virtue of s 146 of this Code. That section has been inserted adopting the principles laid down in 29 Cal 33, and 29 All 574, and it has nullified the Allahabad case in 21 All 274 and the Madras case in 28 Mad 361. **See** cases under section 146.

C P C (1908) O 9 r 13=(1882, S. 108)
-Contd.

For the meaning of the expression "*prevented by sufficient cause*" used in this rule. See 13 Bom 13 & rule 9.

C P C O 9 r 13=(1882 S. 108).

1 **Applicability 1826-1829**
2 **Heir's right to apply under this section 1830-1835**
3 **What amounts to non-appearance of defendant & exparte hearing 1836-1852**
4 **What does not amount to an exparte decree 1853-1864**
5 **Non-appearance as summons was not duly served 1865-1878**
6 **Prevented by sufficient cause from appearing 1879-1893**
7 **Court's order upon such terms as to costs 1894-1897**
8 **Exparte decree can be set aside by a regular suit 1898-1903**
9 **Onus of Proof 1904**
10 **Effect of setting aside an exparte decree 1905-1927**
11 **Appeal filed-Power to set aside decree vests in the appellate court 1928-1930**
12 **Appeal against orders in this section 1930-1944**
13 **Court's inherent power to set aside exparte order 1945-1962**
14 **Orders under this section are subject to review 1963-1969**
15 **Limitation for an application under this section 1970-1971**
16 **Miscellaneous Cases 1972-1977**

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1 Applicability.

1 Miscellaneous proceedings 1826
2 Suit for rent 1827-1828
3 Failure of defendant to file affidavit of documents, defence struck out in consequence and decree made exparte 1829

2 Heir's right to apply under this section.

1 Right of representative 1830-1831

C P C (1908) O 9 r 13=(1882, S. 108)
-Contd.

2 Decree ex-parte—Death of judgment-debtor—Application by legal representative to have the decree set aside 1835

3 What amounts to non-appearance of defendant and exparte hearing

1 Minor—Decree—Guardian ad litem—Validity of 1836
2 Revival of suit after dismissal under s. 157 1837
3 Appearance by pleader——Exparte hearing—Not instructed to answer 1838-1841
4 Suit adjournment of hearing of—"appearance" 1842
5 "Appearance" of defendant under Civil Procedure Code ss. 100, 101 1843-1844
6 Absence of defendant on adjourned hearing 1845
7 Defendant not appearing at an adjourned hearing 1846-1848
8 Non-appearance of several defendants 1849-1850
9 Decree on an alleged compromise repudiated by defendants, whether exparte 1851
10 Dismissal for default of prosecution 1852

4 What does not amount to an exparte decree.

1 No decree against a person not appearing 1853
2 New trial—Parties—Non-appearance of 1854
3 Appearance—Appearance by pleader—Exparte decision 1855-1856
4 Appearance of party 1857
5 Default in appearance after adjournment 1858
6 Filing written statement 1859-1860
7 Written statement, Tender of 1861
8 Absence at adjourned hearing 1862
9 Decree obtained on document afterwards alleged to be forged 1863-1864

5 Non-appearance as summons was not duly served.

1 Not open to the document to challenge the decree as summons was not served 1865

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

2 Application to set aside—irregular service of summons 1866-1868
3 Summons suit to set aside, on the ground of non-service of summons 1869
4 Summons on defendant, good in law, entitled to a new trial 1870
5 Notice on pleader if notice on client 1871
6 Defendant summoned in wrong name 1872-1873
7 Service of summons on defendant—Substituted service 1874-1875
[illegible] Fraud—Exparte decree—Bona fide belief 1876-1877
9 Duty of Court, must ascertain whether the summons had been duly served 1878

6 Prevented by sufficient cause from appearing.

1 Affirmative provisions in which plaintiff was prevented by sufficient cause—do not imply the negative 1879.
2 Question of what is sufficient cause is a question not of law but of fact 1880.
3 Sufficient cause for non-appearance—Absence of counsel or attorney 1881
4 Sufficient cause for non-appearance – Mistake 1882
5 Applicant sued as partner but not served personally-Sufficient cause 1883
6 Cause for non-appearance at adjourned hearing 1884
7 Defendant present in Court house—Appearance-Sufficient cause 1885
8 Prevention from appearing by sufficient cause—Exparte decree against minors 1886
9 Minor not properly represented 1887
10 Minor—Guardian—Default 1888
11 Written statement filed—Party not appearing—Whether decree is exparte 1889
12 Decree showing sufficient cause should not be set aside 1890
13 Ground for setting aside decree wrongly attached 1891
14 Defendant showing no sufficient cause for non-appearance 1892

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

15 Insufficient reason for non-appearance 1893

7 Court's order upon such terms as to costs. 1894-1897

8 Exparte decree can be set aside by regular suit 1898-1903.

9 Onus of Proof 1904.

10 Effect of setting aside an exparte decree.

1 Whether affects decision of the case 1905
2 Validity of attachment 1906
3 Effect of order under s. 101 against [illegible] defendant and not appealed from on his right to apply to set aside exparte decree 1907
4 Effect of setting aside exparte decree and reopening the case 1908
5 Opening of the objection of the other party 1909-1911
6 Exparte decree against one defendant—Right to open the whole case 1912-1918
7 Effect of [illegible] decree set aside at the instance of some only of several defendants against whom the decree passed was exparte 1919—1919A
8 Setting aside an exparte decree on condition of finding surety 1920
[illegible] Exparte order by court-setting aside of 1921
10 Fraud 1922
11-12 Sale must be set aside when the decree itself is set aside 1923—1924
13 Setting aside exparte order absolute for foreclosure 1925
14 Procedure on grant of new trial of exparte decree case 1926
15 Set aside exparte person and suit retried-Execution—Course to be followed—Practice 1927

11 Appeal filed in power to set aside decree vests in the appellate court. 1928-1930

C P C (1908) O. 9 r.13- 1882, S.108) -*Contd.*

12 Appeal against orders in this section.

1 Applicability of [illegible] 108—Appeal from order 1931
[illegible] Appeal from exparte decree 1932
[illegible] Appeal against exparte decree, arguments permissible in support of 1933
4 Reversal of Judge's order by High Court 1934
[illegible] Absence of defendant 1935
6 Appeal final-No appeal "affecting the decision of the final case 1936
7 Appeal from final decree 1937
[illegible] Exparte order passed in regular appeal —No special appeal 1938
[illegible] Re-hearing expiration of time limited 1939
10 Appeal from order refusing application under s. 108 1940
11 Decree setting aside exparte decree not appealed against 1941
12 Appeal treated as application under s. 108 1942
13 Dismissal for default of case in execution of decree 1943
14 Cases in appeal 1944.

13 Court's inherent power to set aside exparte orders.

1 Power of the small [illegible] court 1945
[illegible] Acting within the powers—Sound discretion 1946
[illegible] Ristricted pecuniary jurisdiction to make a decree for [illegible] sum exceeding jurisdiction 1947
[illegible] Power to deal with [illegible] application to set aside an order-Exparte 1948
[illegible] Duty of court before issuing notice to the opposit side 1949
6 Power to remove receiver 1950
7 Jurisdiction of District Judge to re-open an exparte decree 1951
[illegible] Jurisdiction to hear the application, pendency of the appeal 1952
[illegible] Court to remand suit for re-hearing 1953
10 Jurisdiction—Challenged in appeal against final decree 1954
11 Non-appearance of defendant after filing written statement 1955

C P C (1908) O 9 r 13=(1882, S.108) -*Contd.*

12 Power to restore an ex-parte decree once set aside 1956
13 Jurisdiction to set aside the personal decree against defendants 1957-1958
14 Power to re-open question—Order 1959
15 Decree under S. 148 Civil Pro Code 1960
16 Exparte decree passed on appeal 1961
17 Power of original Court 1962

14 Orders under this section are subject to review.

1 Trial on merits 1963
2 Absence of pleader 1964
3 Revision 1965—1968
4 Ground for setting aside exparte decree [illegible] 1969

15 Limitation for an application under this section 1970—1971

16 Miscellaneous Cases.

1 Legal right to bring a suit 1972—1974
[illegible] Right of party who has not come into the benefit of dismissal of suit 1975—1977
3 Whether an auction purchaser is [illegible] necessary party to an application to set aside an ex-parte decree 1978

—O 9 r 13—See C P C (1908) S. 105.[Case No (1242A)

See also:- (1) Limitation.
(2) Resjudicata.
(3) Mortgage foreclosure.
(4) Practice
(5) Presidency Small Cause Court's Act s. 38.
(6) Appeal—Ex-parte Cases
(7) Limitation Act, 1877, art 164 (1871, art 157; Act VIII of 1859, s. 119).

—O 9 r 13—S. 108—See C P C (1882) [illegible] 157 [illegible] **W N 199.**

C P C (1908) O. 9 r.13=(1882,S. 108) -Contd.

—O 9 r 13=S. 108—See Multifariousness
2 C L J 602.

—O 9 r 13=S. 108—See C P C O 21 rr 10, 21 S. 48
11 C W N 440.

—O 9 r 13=S. 108—See Dekkan Agriculturists Relief Act
1887 P J 39

—O 9 r 13=S. 108—See C P C (1908) O 17 [illegible] 2=(S. 15 of 1882). Case No (2095).
7 M L T 308.

1 APPLICABILITY.

(1) Miscellaneous proceedings.

1826—C P C O 9 r 13—Miscellaneous proceedings—Application for re-hearing.

An application for substitution of names was decided *exparte*. On an application made for rehearing, *held*, that O 9, r 13, was applicable to proceedings of this kind as well as to suits. (17 All 106, Fol) **Khushalgir v Gobindgir. 6 A L J 760.**

(2) Suit for rent.

1827—C P C O. 9 r 13 of 1908=1882 s. 108—Beng Act VIII of 1869, s. 34.

S. 119 of the Civil Procedure Code (Act VIII of 1859) was made applicable to rent suits under Bengal Act VIII of 1869 by the provisions of s. [illegible] of the latter Act. **Dhabamayi Guptia v Tarracharan Sen. 7 B L R 207: 16 W R 17.**

1328—C P C O 9 r 13=(1882 S. 108)-Insolvency order, setting aside of.

S, 108, C P C does not apply to the setting aside of an insolvency order. **Sarat Chandra Mukerji v Mahomed Hossein. 8 C W N 468.**

(3) Failure of defendant to file affidavit of documents, defence struck out in consequence and decree made ex-parte.

1829—C P C O 9 r 13=S. 108—Application to set aside the decree under s. 108—Civil Procedure Code, 1859, [illegible] 136.

Where the defendants had entered appearance and filed their written statements, but their defence had been struck out under s. 136 of the Civil Procedure Code for failure to file their affidavit of documents and the suit had been placed in the undefended list of cases and a decree made therein and the defendants subsequently sought to set aside that decree under s. 108, Civil Procedure Code:—*Held* that the wording of s. 108, Civil Procedure Code, as well as its position in the Act, shows that its operation is limited to decrees made *ex parte* under the provisions of Ch VII, and does not govern other decrees made *ex-parte* unless where it has been extended to those decrees by other provisions of the Code. *Held*, also, that whatever may be the effect of the words " and to be placed in the same position as if he had not appeared and answered" in s. 136. it does not intend to introduce into the class of cases dealt with by s. 108 a new class of cases of an entirely different character, and the decree in the suit was not an *ex-parte* decree within the meaning of s. 108. (7 Mad 139, 11 Ch D, 767, referred to. [illegible] Cal 923, distinguished.) **Kesharia Accomar Sreesungjee v Potoosh Sett. 2 C W N 676.**

2 HEIR'S RIGHT TO APPLY UNDER THIS SECTION.

(1) Right of representative.

1830—C P C O 9 r 13; S. 50; O 22 r 4=(1882 Ss. 108, 234, 368)—Right af representative to apply to set aside ex parte decree—Limitation.

The representative of a deceased judgment-debtor against whom an *ex parte* decree had been passed cannot apply to set aside the decree under s. 108, nor can they themselves apply to be brought on the record. The section applicable is S. 234; the judgment-creditor alone can apply to bring them on the record. **Sambusiva Chetty v Veera Perumal. 98 Mad 361.**

Notes:—Ref: 6 M L T 269.

1831—C P C O 9 r 13=(1882 S. 108).

Application to set aside *ex parte* decree-defendant dying after making application—Right of representative to proceed with the application. Where a defendant against whom an *ex-parte* decree was passed died after making an application to set aside the *ex-parte* decree but before any

C P C (1908) O. 9 r. 13=(1882, S.108) -*Contd.*

(2) Heir's right to apply under this section—*Contd.*

order was made on it, *held*, that her representative could proceed with the application. (21 All 274, diss. 29 Cal 33 referred to.) **Beti Jeo v Sham Biharilal.** **4 A L J 480=1907 A W N 176=29 All 574.**

1832—C P C O 9 r 13—Ex parte decree—Death of judgment-debtor—Application by legal representative of the judgment-debtor to have the exparte decree set aside.

Held, that where a defendant against whom a decree has been passed *ex parte*, dies, his legal representative is competent to apply under Section 108 Civil Procedure Code, for an order to set the *ex parte* decree aside.

(29 Cal 33; 21 All 274, dissented from.)

Mussammat Jas Kaur v Bhai Mehtab Singh 36 P R 1903=88 P L R 1903.

1833—C P C O 9 r 13; S. 114, O 47 rr 1, 7, 9 =(1882 Ss. 108, 623 and 629)—Review—Application by representatives of a deceased party.

Held, that notwithstanding s. 108 of the Code the terms of s. 623 were sufficiently wide to admit of an application being made by the representatives of a deceased party who would be materially affected by the decree; and that having regard to the provisions of s. 629, no appeal lay against the order admitting the application for review except on the question of limitation. **Debi Das v Narain Parshad. 9 O C 35.**

1834—C P C O 9 r 13=(1882 S.108)—Representative of defendant, right of—Exparte decree—Petition to set aside.

The representative of a deceased defendant can apply to set aside an *exparte* decree just as the defendant himself could have done. (21 All 274 diss. from). **Ganoda Prasad v. Shib Narain Mukerjee. 29 Cal 33.**

Notes:—Fol: 36 P R 1903=88 P L R 1903. Ref: (1907) W N 176=4 A L J 480=29 All 574; 6 O C 34.

(2) Decree exparte-Death of judgment-debtor—Application by legal representative to have the decree set aside.

1835—C P C O 9, r 13=S. 108-Legal representative cannot apply.

C P C (1908) O 9 r 13=(1882, S. 108) · *Contd.*

(2) Heir's right to apply under this section—*Concld.*

Where a judgment-debtor against whom a decree has been passed *exparte*, dies, his legal representative is not competent to apply under s. 108 of the Code of Civil Procedure to set the decree aside. **Janki Prasada v Sukhrani. 19 W N 58. 21 All 274.**

Notes—Diss: 29 Cal 33. Dist: 29 All 574; W N (1907) 176.

3 WHAT AMOUNTS TO NON-APPEARANCE OF DEFENDANT & EXPARTE HEARING.

(1) Minor—Decree—Guardian ad litem—Validity of.

1836—C P C O 9, r 13=(1882) S. 108—Guardian ad litem—Representation by Nazir as guardian ad litem.

The mere circumstance that the Nazir, who was appointed a guardian *ad litem* did not defend the suit because he had no instructions, cannot affect the validity of the decree.

The mere fact that a decree is obtained *ex parte* does not make it illegal or invalid. **Vishnu Narayan v Dattu Vasudeo. [illegible] Bom L R 1099.**

(2) Revival of suit after dismissal under S. 157.

1837—C P C 9 r 13=S 108-Provincial Small Cause Court Act (IX of 1887) S. 17.

Under S. 108 of the C P Code a suit may be revived if it has been dismissed under s. 157. The expression "a decree passed ex parte" in s. 17 of the Provincial Small Cause Courts Act should be read with s. 108 C P Code and does not include cases dismissed for default. (21 Cal 269 referred to. 23 Cal 738 followed.). **Jamina Bibi v Seri Chand Bhagat. 2 C W N 693**

(3) Appearance by pleader—Exparte hearing—Not instructed to answer.

1838—C P C O 9, r 13 of 1908=1882 S. 108.

Held that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer, or instructed not to answer at all, was an "*ex parte* hearing" and that no appeal lay from a judgment passed in such suit. **Bhimacharya Bin Vyanakacharya v Fakirappa Bin Annandappa. 4 Bom H C R A C 206**

C P C (1908) O 9 r 13=(1882, S.108) *-Contd.*

(3) What amounts to non-appearance of defendant & ex-parte hearing—*Contd.*

Notes—Diss: 20 W R 53. Ap: 6 B L R O 688; 23 Bom 414. Ref: 15 W R 503; 16 Bom 23; 7 All 538; 5 C L J 247 F B; 34 Cal 403 F B; 11 C W N 339 F B.

1839—C P C O 9, r 13; O 17 rr 2; 3—(1882 Secs, 108, 157, & 158).

Defendants applying for adjournment after settlement of issues—Case adjourned to a fixed day—Further application for adjournment by defendants through Vakil—Refusal by Court—Vakil informing the Court that he has no instructions—Hearing of the suit—Decree against both defendants—Decree, if ex-parte against the second defendant.

The plaintiffs brought a suit against the 1st defendant and his son, the 2nd defendant, a minor, for the recovery of Rs. 5,800 stated to be due under mortgage executed to the plaintiff's father by the 1st defendant.

The defendant set up that he had been adopted by the 1st defendant's uncle who was alleged to be entitled to a portion of the property mortgaged and contended that the mortgage was not binding on him to the extent of his interest in the land. The 1st defendant also raised certain objections to the claim. After the settlement of issues the case was adjourned to the 25th May 1901 for trial, on which date, however, the trial did not come off as there were negotiations for a compromise and the case was adjourned to the 15th of June. The 1st defendant then presented a petition praying that an issue may be framed as to a compromise which, he said, had been entered into between himself and the plaintiffs but which the plaintiffs were unwilling to act up to and asked for postponement of the trial of the case. The 2nd defendant's alleged adoptive mother, who was his guardian *ad litem* applied through the 2nd defendant's vakil for three weeks' adjournment alleging that owing to negotiations for a compromise between the plaintiffs and the 1st defendant according to which as she understood the 2nd defendant was to be exonerated, she was not ready with the evidence to be adduced on his behalf. On the 18th June the suit was adjourned to the 26th idem, the language of the order though recorded on each of the petitions being merely "adjourned to 26th June". On the 24th June the 2nd defendant's guardian *ad litem* presented a petition praying that two months' time be allowed to her to produce evidence on behalf of the 2nd defendant. This petition came on for hearing and was rejected. Upon such rejection the vakil who till then appeared for the 2nd defendant and who moved the application informed the Court that he had no instructions in the case and abstained from taking any further part in the proceedings which took place in the suit. The trial was proceeded with, the guardian *ad litem* of the second defendant being absent, but the other parties being present, after some evidence was recorded a decree was given in favour of the plaintiff's making the land inclusive of the 2nd defendant's share liable. On the plaintiff proceeding to execute this decree, the 2nd defendant's guardian *ad litem* applied under section 108 of the Civil Procedure Code to have the decree set aside. The District Judge dismissed the application being of opinion that the decree should be taken as one passed under section 158 of the Civil Procedure Code.

Held, in appeal, that the ground taken by the District Judge in dismissing the petition was clearly unsustainable and that the action of the Court must be taken to have been under the first part of section 157 of the Civil Procedure Code.

Held, further that the decree passed against 2nd defendant under the above circumstances it must be held to have been an *ex-parte* decree notwithstanding that his Vakil was present and applied for adjournment.

Where a pleader engaged in a case informs the Court that he has no instructions the Court should ascertain whether the Pleader severs his connection with the case. **Ramanuja Reddiar v. Ramaswami, 3 M L T 225=18 M L J 51.**

Notes:—Fol: 31 Mad 505=19 M L J [illegible]=4 M L T 216; [illegible] Ind Cas 23=33 Mad 241=19 M L J 760=7 M L T 369.

1840.—C P C O 9, rr 13, 11=(1882—Ss. 108 106.)—Exparte decree—Pleader asking for adjournment withdrawing from case after refusal-Restoration—Revision.

Where an application by a defendant's pleader for adjournment for the purpose of the issue

C P C (1908) O 9 r 13=(1882 S. 108) -Contd.

(3) What amounts to non-appearance of defendant & exparte hearing—*Contd*

of warrants against certain witnesses and to have certain records sent for having been refused the pleader retired from the case which then proceeded and a decree was passed.—*Held* that the decree was an *exparte* decree. Where a pleader is only instructed to make an application practically for an adjournment and when that application is refused he leaves the Court and takes no part in the hearing of the case the decree passed cannot be regarded as other than an *exparte decree.* (27 Cal 529 diss from;23 Cal 738 fol). **Cooke v The Equitable Coal Co. Ltd,** **8 C W N 621.**

Notes:—Ref 6 C L J 226. Appr 34 Cal 403, F B; 5 C L J 247 F B; 11 C W N 329 F B; Fol 36 Cal 189.

1841.—C P C O 9 r 13 of 1908=S. 108 Decree ex-parte—Pleader retained in suit but not instructed.

A party defendant retained a pleader to defend the suit against him and the pleader filed a vakalatnamah and did certain acts for the defendant. However when the suit came on for hearing, the pleader came into Court and stated that he had no instructions and could not go on with the case practically that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff. *Held* that this decree was a decree *ex-parte* within the meaning of s. 108 of the Code of Civil Pro.(19 All 355and 23 Cal 738 referred to.2 All 67;L R 5 I A [illegible] distinguished.) **Shankar Dat Dube v Radha Krishna.** **20 All 195.**

Notes:—Ap 23 Bom 414; 22 All 66 F B. Dist 20 All 294. Ref; 19 M L J 222; 11 C W N 329 F B; 34 Cal 403 F B; 5 C L J 247 F B; 31 Mad 505; Affirmed.23 All 220 P C.

(4) Suit, adjournment of hearing of "Appearance."

1842.—C P C O 9 r 13=(1882) S. 108—"Appearance"of defendant—Civil Procedure Code ss. 108, 157.

A Munsif before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in court a pleader, who had been instructed by the two principal defendants at the outset, and who had filed his vakalatnama.There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defence, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence, and the Munsif decreed the claim. *Held* that, under the circumstances stated, the defendant's pleader must be taken not to have been in Court on the date fixed for the purpose of defending the suit on behalf of the defendants, inasmuch as upon that part of the case, he had not been instructed that it was therefore a fair inference that the defendants did not appear, and the case was disposed of under s. 157 of the Civil Procedure Code;and that under these circumstances, the provisions of s. 108 were applicable and the decree was an *ex-parte* decision, which it was open to the Munsif to reconsider, (7 All 538 followed.) **Ramtahal Ram v Rameshar Ram.** **8 All 140.**

(5) Appearance of defendant under Civil Procedure Code ss. 100, 101.

1843.—C P C O 9 r 13=S. 108 s. 100 C P C Ex-parte decree.

The first hearing of a suit was fixed for the 12th December 1883 on which day the defendant did not appear and the case was adjourned to the 18th December, and as the defendant did not then appear a decree was passed in favour of the plaintiff. A *vakalatnama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment. *Held* that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s 100 of the Code of Civil Procedure which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64 that

C P C (1908) O 9 r 13=(1882 S. 108) -*Contd.*

(3) What amounts to non-appearance of defendant & exparte hearing—*Contd.*

the decree was therefore *exparte* within the meaning of ss. 100 and 108. (3 All 67 distinguished 6 B L R 688; 4 Bom H C R 206 and 7 W. R, 81) referred to.

Per Mahmood, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Code of Civil Procedure and choosing the first of the alternative courses allowed by that section, acted under Chapter VII of the Code, and passed *ex parte* decree under the provisions of S. 100 of that Chapter. **Hira Dai v Hira Lal** **7 All 538. 5 W N 144.**

Notes:—Ap 20 Bom 380; 23 Bom 414. Fol 8 All 140. Con 23 Cal 991. Ref 18 All 241; 34 Cal 403 F B; 5 C L J 247 F B; 11 C W N 329 F B.

1844.—C P C O 9 r 13=S. 108-Ex-parte decreé "Appearance", What constitutes-Civil Procedure Code s. 100.

A summons was issued to a defendant in a civil suit. The serving officer, being unable to find either the defendant or any person empowered to accept service for him at the address given affixed a copy of the summons to the outer door of the defendant's house, and returned the original to Court. On the day notified in the summons as the case was called on and upon its being called on a pleader presented himself in Court with a power-of attorney executed not by the defendant himself, but by a third person on his behalf, and stated that the defendant had no notice of the time fixed for the hearing of the case and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date, no one appeared for the defendants, and a decree was passed against him. *Held* that there was no appearance on behalf of the defendant within the meaning of s. 100 of the Code of Civil Procedure, and that the decree passed on the adjourned date was therefore an *ex-parte* decree (7 All 538 and 8 All 140 referred to, A W N 1893. 25, W N 208, and 2 All 67; L R [illegible] 1 A 233, distinguished.) **Chaudhri Raj Kumar v Jugal Kishore.** **18 All 241.**

C P C (1908) O 9 r 13=(1882 S. 108) -*Contd.*

(3) What amounts to non-appearance of defendant & exparte hearing—*Contd.*

(6) Absence of defendant on adjourned hearing.

1845.-C P C O 9 r 13=S.108-Non-appearance

S. 119 Act VIII of 1859, does not apply to a defendant who is only absent on an adjourned hearing. It relates only to one who has never appeared. **Gorachand Goswami v Raghu Mandal.** **3 B L R Ap121; 12 W R 169.**

Notes:—See 12 W R 169.

(7) Defendant not appearing at an adjourned hearing.

1846—C P C O 9 r 13=1882. S. 108-Exparte-decree.

S. 108 C P Code is applicable to any case in which a decree is made exparte either under s.100 or under s. 157 C P Code. (2 All 67: 5 I A 233 distinguished, 21 Cal 269 overruled.)

Jonardan Dobey v Ramdhone Singh.
23 Cal 738.

1847.—C P C O 9 r 13=S. 108—Procedure—Civil Procedure Code Ss.100, 108, and 157—Presidency Court of Small Causes-Adjourned hearing—Absence of defendant-Ex parte decree.

A defendant is entitled to avail himself of Sec 108 of the Civil Procedure Code where an *exprate* decree is passed against him at an adjourned hearing. **Hildreth v Sayaji Piraji.** **P J 1895. P. 1893; 20 Bom 380.**

Notes:—Ref 31 Mad 505.

1848.—C P C O 9 r 13 (=old s. 108) O 17 r 2 (=old s. 157.)

A defendant appeared at the first hearing of a case but failed to appear at the adjourned hearing. An *ex parte* decree was passed against him. The defendant then applied to the Court to set aside the *exparte* decree under s. 108, Civ Pro Code, 1883. But his application was refused and the Chief Court *held*, on appeal that s. 157 Civ. Pro Code 1882, applied to the case, as the order directing an *exparte* hearing of the case was passed, not for the defendant's contumacy, but on account of his non-appearance; that as the Court had, under s. 157. Civ Pro Code 1882, proceeded ex-

(3) What amounts to non-appearance of defendant & exparte hearing—*Contd.*

parte the decree was an *ex parte* decree, to which s. 108, was applicable: that, therefore, the application under s. 108 Civ Pro Code. was properly entertained.and that the order rejecting the application was appealable. (21 Cal 269 Ref.). **Baldeo Sahai v Manohar Lal. 82 P R 1895.**

(8) Non-appearance of several defendants.

1849—C P C O 9 r 13=1882 S. 108—Exparte decree.—

In a case in which one of many defendants, who was made [illegible] party to the suit, did not appear, and a decree for possession was passed without any such special orders regarding that defendant as might have been passed under s. 116 Act VIII of 1859,—*Held* that no *ex-parte* judgment was passed against her, and she could not re-open the suit under s. 119, Code of Civil Procedure. **Sheelabutty Debia v Tarinee Churn Chuckerbutty. 9 W R 597.**

Notes:—Ref: 21 W R 280.

1850—C P C O 9 r 13=(1882 Ss. 108).

"A defendant."—There is nothing in section 106, C P C which conflicts with or limits the operation of sec. 108 and the application of the latter section is not limited to the case of [illegible] sole Defendant who has not appeared or where there are more Defendants than one and none of them has appeared. **G P Cooke v The Equitable Coal Co. Ld. 8 C W N 621.**

Notes!—Ref: 6 C L J 326, App; 34 Cal 403 F B; 5 C L J 247 F B; 11 C W N 329 F B. Fol: 36 Cal 189.

(9) Decree on an alleged compromise repudiated by defendants whether ex-parte.

1851.—C P C O 9 r 13=(1882 section 108.)

Where a Court finds that an alleged compromise on which the decree was based was not actually entered into by the defendants, that the defendants were not duly served with summons and were not present or represented at the trial, it is justified in holding the decree so made as an *ex parte* decree and that the defendants are entitled to apply under section 108 of the Civil Procedure Code. **Bholai Naskar v Alach Naskar. 3 C L J 158.**

(3) What amounts to non-appearance of defendant & exparte hearing—*Concld.*

Notes:—Ref 3 C L J 160, 13 C W N 1197. 10 C L J 420=2 Ind Cas 129.

(10) Dismissal for default of prosecution.

1852.—C P C O 9 r 13 =1882 S. 108—Absence of witnesses.—

The plaintiff's witnesses not being present on the day fixed for the hearing of the plaintiff's suit, it was dismissed for default of prosecution under s. 114 of the Code of Civil Procedure, and was afterwards re-admitted undre s 119. *Held* that, the default not being of the nature described in s.114, the suit was wrongly dismissed under that section, and for the same reason that the suit was improperly dismissed under that section, it was also improperly readmitted under s 119. **Mahomed Azeemoolla v Ali Buksh. 5 N W 75.**

See also **Ram Sundar Singh v Ram Bandhan Singh. 7 N W 126.**

4 WHAT DOES NOT AMOUNT TO AN EXPARTE DECREE

(1) No decree against a person not appearing

1853.—C P C O 9 r 13=(1882 S 108).

Applicability of section—S 108 C P C even if exhaustive, does not apply to a case in which there is no *decree* against [illegible] person who has not appeared. **Nand Ram v Ramdyal I A L J 470.**

(2) New trial—Parties-Non-appearance of.

1854.—C P C O 9 r 13=S 108—Exparte decree—Presidency small cause Court Act (XV of 1882) C P Code s 157.

C P Code makes a distinction between [illegible] decided exparte in the absence of one of the parties after the first hearing and cases decided in the absence of one of the parties at [illegible] adjourned hearing chapter VII of the Code deals with the appearance and the consequences of the non-appearance of the parties at the first hearing and chapter XIII of which s 157 forms a

C P C (1908) O. 9 r.13=(1882, S. 108) *-Contd.*

(4) What does not amount to an exparte decree—*Contd.*

part prescribes the procedure for the trial of a suit on an adjournment after the hearing.

Therefore where the defendant appeared at the first hearing in the Small Cause Court and failed to appear on day on which it was adjourned for hearing and a decree was given against him.

Held that such a decree was not made exparte so as to enable the defendant to obtain the benefit of s 108 but that his only remedy was under s 37 of Act XV of 1882. **Sital Hari Banerjee v Heera Lal Chatterjee 21 Cal 269.**

Notes.—Over: 23 Cal 738 F B. Not fol: 2 C W N 693. Disap: 20 Bom 380. Ref. 23 Cal 325.

(3) Appearance—Appearance by pleader —Exparte decision.

1855.—C P C O 9 r [illegible] of 1908=1882 s 108.

An appearance in person or by pleader, without putting in any answer or written statement, is an appearance within the meaning of S. 119, of Act VIII of 1859, and the judgment pronounced thereafter is not an *ex-parte* judgment, and therefore an appeal will lie. **Goluckbur v Bishonath Geeree. Marsh 32 Jankee Ram Doss v Chundrabutty Debia 7 W R 295.**

Notes.—Ap: [illegible] All 67 P C.

1856.—C P C O 9 r 13 of 1908=s 108-Appearanec by pleader.—

When a duly authorized vakil of the defendant under a vakalatnamah filed in Court appears for his client on the day fixed, and the case comes on for hearing, the decree passed on such hearing is not an *ex-parte* decree, even though the pleader be not sufficiently instructed to proceed with the case. **Dhan Bhagut v Ramessur Dutt Singh 20 W R 53.**

Notes.—Ref: 16 Bom 23; 8 C W N 621; 11 C W N 329 F B; 34 Cal 403 F B.

(4) Appearance of party.

1857.—C P C O 9 r 13(=Civ Pro Code, 1882 s 108)—Ex parte decree.—

C P C (1908) O. 9 r.13=(1882, S. 108) *-Contd.*

(4) What does not amount to an exparte decree—*Contd.*

A party to a suit cannot claim to have a decree against him set aside as an *ex parte* decree, when in fact, an appearance was made by a pleader in his behalf on the day fixed for the hearing, even though such pleader was, for some reason unable to proceed with the suit. (A W N 1893, 25, followed.) **Ganga Das v Indarman A W N 1893, 208.**

Notes.—Dist. [illegible] All 241.

(5) Default in appearance after adjournment.

1858.—C P C O 9 r 13=1882 s. 108.

The parties to a suit appeared on the day fixed for the first hearing. On the application of defendant's vakil, the hearing of the suit was adjourned in order to enable them to obtain certain documents from the Collector's office, and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing, they were still in default, and also failed to appear in person or by vakil. A decree was given for the plaintiff. *Held* that the decree of the original Court was not an *ex-parte* decree under s 147 of the Code of Civil Procedure for non-appearance, but a decree under s 148, and was therefore appealable. **Rangasamy Mudelliar v. Sirangan. Thandraya Gounden v Sithaiyan 4 Mad H C R 254.**

Notes.—Fol: [illegible] M H C R 262. Dist: 1 Mad 287. Ref: 5 C L J 260; 34 Cal 235; 18 [illegible] L J 61.

(6) Filing written statement.

1859.—C P C 9 r 13 (1908)=S 108 (1882) —Ex-parte case.

Where a defendant entered appearance and filed a written statement, the [illegible] cannot be *ex-parte*, though the defendant does not appear in person at the hearing; and the defendant's vakil is entitled to cross-examine the plaintiff's witnesses.

Pakaktar v Jakriram Bhokath 11 W R 5.

1860.—C P C O 9 r 13 of 1908=1882 s 108-Appearance by pleader.

(4) What does not amount to an exparte decree—*Contd.*

Where a defendant appears in person or by pleader, the fact that the defendant is not prepared to put in a written statement does not warrant the trial of a suit *ex-parte.* **Sivarajadhani Nilakantham Pillai v Cuppa Gantulu Ramiah Pantulu** **2 Mad H C R 311.**

(7) Written statement, tender of

1861.—C P C O 9 r 13 of 1908=1882 S. 108 -Ex-parte decree—Appeal-Appearance of defendant.—

The Court of first instance refused to receive the defendant's written statement because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained. The Court however, framed the issues in the presence of the defendant's pleader, who was also allowed to cross-examine the plaintiff's witnesses. The Court made a decree in favour of the plaintiff. In appeal, the District Judge held that the decree of the first Court was *ex-parte* under s. 119 of the Civil Procedure Code, and that, therefore, no appeal lay. *Held* by the High Court, in special appeal, that the decree of the first Court was not *ex-parte* under the circumstances.

Raghapa Bin Hanmapa v Parapa Bin Shivapa **1 Bom 217.**

(8) Absence at adjourned hearing.

1862.—C P C O 9 r 13=S. 108—Putting in written statement.

A mere formal appearance in Court with no further action than the putting in a written statement does not prevent a decision in the absence of the defendant from being regarded as an *ex-parte* decision under the Civil Procedure Code. **Purus Ram v Juyuntee Pershad** **1 N W; Ed; 1873 154.**

(9) Decree obtained on document afterwards alleged to be forged

1863.—C P C O 9 r 13 (1908)=S. 108 (1882) —Exparte decree.

W obtained a decree against *D* and others, founded upon a solehnamah said to have been put in by them. Certain property belonging to

(4) What does not amount to an exparte decree—*Contd.*

D was attached in execution, and a notice of sale proclaimed. Thereupon *D* came into Court alleging that she had never had notice of the original suit, and that the solehnamah put, in, so far as she was concerned was a cheat and a forgery, and asked for an enquiry and to be relieved from the execution. *Held* that the decree was not an ex-parte decree, and could not therefore be disturbed by a resort to the provisions of s 119. Act VIII of 1859.

Hemmo Moyee Dayee v Watson & Co. **14 W R 297.**

1864.—C P C O 9 r 13; O 17 r 2=(1882 Ss 108 and 157).

Suit decreed *ex parte*—Application for setting aside the *ex parte* decree—Whether at the stage of the hearing the suit was decreed *ex parte.*

After the plaintiff closed his case, and some days after the defence began, application for adjournment was made by defendant's Counsel. The case was adjourned for the next day, *first*, to enable he witnesses to attend, and *secondly* if such witnesses did not attend, for a proper application supported by affidavit, for adjournment being made. On the next day the application for adjournment was refused and suit was decreed *ex parte.* The defendant, without appealing against the order refusing adjournment applied under S. 108, C P C, for setting aside the *ex parte* decree.

Held: Under the circumstances, the decree had not been passed *ex-parte* and that the defendant was not entitled to apply under S. 108.

The defendant was not, however, without remedy; his course was by way of appeal against the order refusing adjournment, and if the Appellate Court considers any further evidence necessary, it may direct that evidence to be taken; or possibly the defendant might, if in time, apply for a review. **Kader Khan v. Juggeswar Prasad,** **35 Cal 1023.**

5 NON-APPEARANCE AS SUMMONS WAS NOT DULY SERVED.

(1) Not open to the defendant to challenge the decree as summons was not served.

1865—C P C O 9 r 13=C P C (1882) S. 108—Exparte decree.—

C P C (1908) O. 9 r.13=(1882, S 108) -Contd.

(5) Non appearance as summons was not duly served—Contd.

It is not open to the defendant, against whom an *ex parte* decree has been passed, to challenge the decree in an independent action, on the ground that the summons was not served on him. His remedy, if he wishes to set aside the *ex parte* decree on that ground, is by an application under S. 108, Civil Procedure Code, 1882. He cannot have that decree set aside in an independent action, except by establishing that the decree was obtained by fraud. (21 Cal 605; 28 Cal 475; 29 Cal 395; and 21 All 279, relied upon).

Lakshminarain Dutt v. Fazil Mahomed. 7 Ind Cas 163.

(2) Application to set aside irregular service of summons.

1866—C P C O 9 r 13, O 5 r 17=1882 S. 108-Application to set aside a decree passed exparte.

Where a serving officer finds a defendant to be away temporarily from home and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service. **Sakina v Gawri Sahai 1902 A W N 68=24 All 302**

1867-C P C O 9 r 13=S 108—Ex-parte decree—Application to set aside.— Defendant not personally served with summons.

The defendant applying under this section must satisfy the Court that the summons was not "duly served" on him or that he was prevented by sufficient cause from appearing. There may be due service without a personal receipt by a defendant of the summons and therefore an *ex-parte* decree cannot be set aside merely on the ground that the defendant " did not personally get the summons". **Balakhidas v. Hargoven, 1891 P J 39.**

1868—C P C O 9 r 13=S.108-The rejection of applications to set aside an *ex parte* decree, on the ground of insufficiency of service under sec. 108, C P Code, and sale in execution thereof, on the ground of irregularity under sec. 311, relates only to specific matters in the suit, and is therefore no bar to a fresh suit to set aside the decree on the ground that the whole suit was fraudulent. **Khagendra Nath Mahata v Pran Nath Roy 6 C W N 473=29 Cal 395 P C =29 I A 99.**

C P C (1908) O. 9 r.13=(1882 S. 108) -Contd.

(5) Non-appearance as summons was not duly served—Contd.

(3) Summons suit to set aside, on the ground of non-service of summons.

1869—C P C O 9 r 13=C P C (1882) s. 108—Summons suit to set aside on the ground of non-service of summons, maintainability—Non-service of summons, defence of, if can be raised. A decree can be set aside either under section 108 of the Code of Civil Procedure on the ground of non-service of summons, or on review or by a regular suit on the ground of fraud. Non-service of summons alone is not a ground for setting aside a decree by suit.

If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit. **Narsingh Das v Bibi Rafikan. 11 C L J 350=14 C W N 507=37 Cal 107=5 Ind Cas 198.**

(4) Summons on defendant, good in law, entitled to a new trial.

1870—C P C O 9 r 13=C P C (1882) S. 108.

In an *ex-parte* case, if the summons on defendant is not good in law, he is entitled to a new trial.— **Goormookh Singh v. Koora, P R 79 of 1868.**

(5) Notice on pleader if notice of client.

1871—C P C O 9 r 13=C P C (1882) S. 108—Exparte decree—Appeal from preliminary decree disposed of—Arrival of records in Lower Court—Parties how to be notified.

An appeal preferred to the High Court against a preliminary decree for accounts having been dismissed for non-prosecution, the record was returned to the Lower Court, which directed notices to be served on the pleaders of the parties for the further hearing of the case, a week hence. Notice was served on the defendant's pleader, but he did not inform the defendant.

Held, that the notice was not a good notice on the defendant, and an *ex parte* decree passed against the defendant on the date fixed should be set aside; that the case should be re-heard upon notice served on the defendant personally. **E F Sandys v Upendra Chandra Sinha Roy, 13 C W N 142=2 Ind Cas 547.**

C P C (1908) O 9 r 13=(1882 S. 108)

–Contd.

(5) Non appearance as summons was not duly served—*Contd.*

(6) Defendant summoned in wrong name.

1872—C P C O 9, r 13 (=Civil Pro. Code 1882, s. 108)—Summons served on the right person—Ex parte—Fresh suit.

A summons was erroneously addressed to defendant under a wrong name, but it was served on the right person. He did not appear to answer the suit and an *ex parte* decree was passed against him. The error was detected, when execution was applied for. *Held*, that the plaintiff should sue again as if nothing had been done.
Hursahai v. Bhawani Dass. **9 P R 1868.**

1873—C P C O 9, r 13 (=Civil Pro Code, 1882, s 108)—Ex parte decree.

Where a summons issued for service on the defendant was not served upon him in consequence of its containing a wrong name of his father and the Court thereupon directed a second summons to be issued and at the hearing the defendant not appearing an *ex-parte* decree was passed and the defendant applied to have that decree set aside alleging that no summons had been duly served upon him but the Court rejected the application on the ground that the defendant had full notice and knowledge of the institution of the suit by reason of the attempt to serve the first summons upon him and refused to allow the defendant an opportunity of showing that the second summons had not been duly served on him, *held*, that the defendant was not bound to act upon any notice not duly served upon him and the first summons having been declared not to have been duly served on him was out of the case and the Court should have enquired only as to the due service of the second summons.
Gurunath v Virupaksha, **1891 P J 142.**

(7) Service of summons on defendant—Substituted service.

1874—C P C O 9, r 13 (=Civil Pro. Code, 1882, s. 108)—Judgment ex parte—Residence out of jurisdiction.—

The Civil Justice Regulation requires that the Service of summons on a defendant, shall, when practicable, be on the defendant in person; if he cannot be found, it may be made on an adult male member of his family residing with him; and when he cannot be found and there is no such person, service may be effected by posting the copy on the outer door of the house in which the defendant is dwelling, if he is dwelling at any place within the local limits of the jurisdiction of the Court. In s. 33 of the Regulation, the word " dwelling " is not used, but the word "resided", showing that a distinction was made between the case of a person permanently living in a place and a casual resident. The inference seems to be that, before the Court issues substituted summons, it should cause a summons to be served in one of the ways mentioned above on a permanent dweller within the jurisdiction and, when the defendant is out of the jurisdiction, service should be effected in the place where he dwells according to the rules there applicable. And this is only reasonable as the defendant, who is not trying to evade process, is entitled to have notice at his permanent dwelling-place, where he can make arrangements to meet the case that may be brought against him. This being so, s. 44 of the Regulation provides that, when a defendant proves to the satisfaction of the Court that the summons was not duly served, the Court shall pass an order setting aside the judgment *ex parte*. **Maung Kywe v. Ma Shwe Me,** **U B R 1892–1896, 262.**

1875—C P C O 9 r 13=C P C (1882) S. 108 —Ex-parte decree — Application by defendant to have the ex-parte decree set aside—Substituted service, effect of –Civil Procedure Code, 1882, Sections 83, 108.—

Held, that a person is not necessarily deprived of his remedy under Section 108, Civil Procedure Code, from applying to have an *ex parte* decree set aside on the ground that he had not been duly served with summons or was prevented by any sufficient cause from appearing, merely because substituted service had been effected on him, and the original summons had been destroyed in accordance with an office rule. (Bourke, 27), doubted. (2 Bom 449), cited.—
Ghallu Ram v. Durga Das, **42 P R 1904.**

(8) Fraud—Exparte decree—Bona fide belief.

1876—C P C O 9 r 13=C P C (1882) S.108,

C P C (1908) O 9 r 13=(1882 S. 108) –*Contd.*

(5) Non-appearance [illegible] summons was not duly served—*Concld.*

Where it is alleged that an *ex parte* decree was obtained by fraud, and it is shown that the defendant did not reside at the place where the summons was served, it is not fraud on the part of the plaintiff if he had a *bona fide* belief that the defendant resided there. **Maung Ngwe Ya v. Allagappa Chetty.** **[illegible] Ind Cas 599**

1877—C P C O 9 r 13=(1882 S. 108)--Suit to set aside decree — Decree ex parte — Only fraud, non-service of summons.—

Where the plaintiff claimed to set aside a decree, on the ground of fraud, and the only fraud alleged was the non-service of summons, and the plaintiff had previously unsuccessfully applied to set aside the *ex parte* decree under s. 108 of the Code. *Held*, that the suit was not maintainable. (28 Cal 475; 29 Cal 395 Dist:) **Puran Chand v. Sheo Dat Rai, 4 A L J 51= A W N (1907), 31=29 All 212.**

Notes:—Fol: 29 All 608; W N (1907), 191. Appl: 4 A L J 665. Ref: 37 Cal 197=11 C L J 250=14 C W N 567=5 Ind Cas 190.

(9) Duty of Court, must ascertain whether the summons had been duly served.

1878--C P C O 9, r. 13—Ex parte decree, applications to set aside—Duty of Court before issuing notice to the opposite side.

When an application is made to set aside an *ex parte* decree, the Court, before issuing notice to the other side, must ascertain whether or not the summons had been duly served, and whether or not the applicant had been prevented by sufficient cause from appearing when his case was called on for hearing. **Dollo v. Sibla Kuar. 9 Ind Cas 31.**

[illegible] PREVENTED BY SUFFICIENT CAUSE FROM APPEARING.

(1) Affirmative provisions in which plaintiff was prevented by sufficient cause do not imply the negative.

1879—C P C O 9, r 13. O 41. r 19—Dismissal for default -- Grounds for—Scope.—

C P C (1908) O 9 r 13=(1882 S. 108) –*Contd.*

(6) Prevented by sufficient Cause from appearing—*Contd.*

O XLI, r 19, and the kindred provisions in O IX, r. 13, mean that the application may be based upon any ground, which would be a just and proper one for granting the application, and not that the application can be upon one ground only, *viz.*, that the applicant was prevented by sufficient cause from appearing. The affirmative provisions of the Code that the plaintiff or appellant may prove that he was prevented by sufficient cause—do not imply the negative, *viz.*, that an application for restoration cannot be granted unless sufficient cause (in this sense) is shown. (26 Mad 599, Ref:) **Nga Chok v. Nga On Gaing, U B R 1909. Civil Procedure 27.**

(2) Question of what is sufficient cause is a question not of law but of fact.

1880—C P C O 9 r 13=C P C (1882) S. 108 —Ex-parte decree—Application by defendant to set aside—Act XI of 1865, Section 21—Act X of 1877, Sec. 100—Sufficient cause.--

Held, that a defendant who is absent at an adjourned hearing, the adjournment having been granted for his benefit, is not precluded from showing sufficient cause for setting aside an *ex-parte* decree passed against him for default.

The question of what is sufficient cause, in [illegible] particular case, to account for the non-appearance of the defendant, is a question not of law but of fact, dependent upon the circumstances of the case.— **Shankar Dass v. Crohan, P R 26 of 1879.**

(3) Sufficient cause for non-appearance—Absence of counsel or attorney.

1881-C P C O 9 r 13 of 1908=S. 108 of 1882.

On an application made under s. 119 of Act VIII of 1859 to set aside a judgment by default. *Held*, that the words "prevented by any sufficient cause from appearing" should be read so as to include the case of the absence of plaintiff's counsel or attorney, when such absence has been caused by a *bona fide* mistake. Under such circumstances, [illegible] judgment by default under s. 114 was set aside upon payment by the attorney of the plaintiff of the costs of the hearing.

Oriental Finance Corporation v. Merchantile Credit and Finance Corporation, 2 Bom H C R 282: 2nd Ed 207.

C P C (1908) O 9 r 13=(1882 S. 108) —Contd.

(6) Prevented by sufficient Cause from appearing—*Contd.*

(4) Sufficient cause for non-appearance —Mistake.

1882 – C P C O 9 r 13=C P C (1882) S. 108.—

On appeal from the rejection of an application made, under s. 119 of Act VIII of 1859, to set aside a judgment by default. — *Held*, that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing", it was enough to show that there had been a *bona fide* mistake, which was not unreasonable. **Hardatrai Shrikisandas v Victoria Finance and Bullion Association,3 Bom H C,O C 60.**

(5) Applicant sued as partner but not served personally--Sufficient cause.

1883—C P C O. 9 r 13=C P C (1882) S. 108—

Exparte decree—Application to set aside exparte decree.—

When a defendant, against whom an *ex parte* decree has been passed as one of the partners without the summons having been served on him individually, applies for the setting aside of the *ex parte* decree, and he denies that he is a partner of the other defendants, the Court should set aside the *ex parte* decree and re-hear the case on its merits. It should not put upon the defendant the burden of proving that he is not a partner, before setting aside the *ex parte* decree. To do so would be trying in the miscellaneous application a question arising on the hearing of the case on its merits. Such procedure is not contemplated by S. 108 of the C P C (1882).

Chokalingam Chetty v. Soobramonian Chetty, [illegible] Ind Cas 448.

(6) Cause for non-appearance at adjourned hearing.

1884—C P C O 9 r 13=C P C (1882) S. 108

—Appearance at first hearing.—

Where a defendant was prevented by the fraud of the plaintiff from appearing on the last day of hearing, the suit was held to have been decided *ex parte*, notwithstanding that the defendant had been represented on the first day of hearing; and the first Court was held to have done right in restoring the case to the file under Act VIII of 1859,s.119. **Denoo Paroye v Chinta Monee Chowdhry. 18 W R 457.**

C P C (1908) O 9 r 13=(1882 S. 108) —Contd.

(6) Prevented by sufficient cause from appearing—*Contd.*

Notes:—Con: 23 Cal 738 F B.

(7) Defendant present in Court-house-- Appearance—Sufficient cause.

1885--C P C O 9. r 13=C P C (1882) S. 108—

Ex parte decree—Setting aside — Though not present in Court when case called out.—

When the defendant is in fact present in the Court-house on the day of hearing, but does not appear in Court when the case is called out, and a decree is passed against him in his absence, it is, so far as he is concerned, *ex parte*. Where a party is alleged to have been seen within the precincts of the Court on the day of the trial of a case, it does not follow that he must be taken to have appeared within the meaning of O. IX, r.13, of the Code of 1908. The phrase "to file an appearance" is used without implying that the party so filing an appearance has been physically present in Court. The mere bodily presence of a party, who has no legal assistance and is perhaps too terrified to put himself forward and endeavour to represent his own case, does not satisfy all the required connotation of the word "appearance". **Manilal Jeshanglal v Virchand Jeychand. 13 Bom L R 1222.**

(8) Prevention from appearing by sufficient cause-Exparte decree against minors.

1886—C P C O 9 r 13=C P C (1882) S.108.-

An *ex-parte* decree having been granted in a suit against A, personally and as guardian of her infant sons, the infants subsequently applied, under s. 119 of Act VIII of 1859, to set aside the decree on the ground that the summons had not been duly served upon A, and the application was dismissed. On appeal to the High Court.—*Held*, that, although, so far as the decrees made A personally liable, the Court had no power to interfere, yet as the infants were not responsible for their non-appearances, it might be said that they had been prevented by "sufficient cause from appearing", and that the decrees might be set aside under s. 119 of Act VIII of 1859, (Act X of 1877, s. 108) as against them. **Kesho Pershad v. Hirdoy Narain. 6 C L R 69.**

Notes: Dist: 6 C L J 445. **Ex:** 5 C W N 58; 24 All 383 F B.

C P C (1908) O 9 r 13=(1882 S. 108) –*Contd.*

(6) Prevented by sufficient cause from appearing –*Contd.*

(9) Minor not properly represented.

1887—C. P. C. O. 9 r. 13; O. 32 rr. 3 (1). 4 (2)=(1882 Ss. 108, 443).

Guardian ad litem—Minor defendant not properly represented—Exparte decree against minor—Application to set aside decree—How far the granting of such application should affect parties other than the applicant. *Held* by the Full Bench that where there has been no appointment of a person as guardian *ad litem* of the minor defendants in the manner prescribed by s. 443 of the Code of Civil Procedure (mere notice of the proposal to appoint being quite insufficient) the minors were entitled to have the decree set aside against them, (14 Cal. 204 and 6 C. L. R 69 ref to) by *Aikman J.* On the question, whether the decree should be set aside as against parties other than the applicant also, it was held by *Stanley* C. J., that where an order is made under s. 108 of the Code of Civil Procedure, the decree set aside is primarily the whole decree and the suit to be proceeded with is the whole suit: though where a decree passed against several defendants consists in reality of separate decrees as against each, it may be that the decree be set aside in part. Where a decree is one and indivisible, it must be set aside in its entirety. (25 Cal. 155 and 5 C. W. N 58 Ref to. 18 Bom 142 not Foll.). Per Burkith J. —On the facts of the particular case the *ex parte* decree ought to be set aside as against all the defendants. Per *Aikman J.*—S. 108 of the Code of Civil Procedure primarily applies so far only as the particular defendant, who seeks to get an *ex parte* decree against him set aside, is concerned; (8 W. R. C. R, 260, ref. to:) though under certain circumstances it may be necessary in the interests of justice that the whole decree should be reopened. Thus when the decree is one and indivisible it must be set aside as a whole or not at all, although, the application to set aside the decree may be the application of only one of the defendants. (15 W. R. C. R. 371 and 4 C. W. N 456 ref, to). The following cases were also considered in the judgment of *Aikman* J.:—(1 W. R. C. R. 232, 7 W. R. C. R. 237, 18 Bom, 142, 25 Cal. 155.)

Bhura Mal v Harri Kishan Das.
1902 A W N 76=24 All 383 F B.

Notes:-Ref: 26 Mad 604; 25 All 42; 601; 606; 29 All 623; W N (1907) 204; 6 C L J 326; 5 C L J 431; 31 Mad 451; 18 M L J 543. Disc: 4 A L J 552.

(10) Minor—Guardian—Default.

1888—C. P. C. O. 9 r. 13=(1882 S. 108). Sufficient cause.

The simple fact that a guardian did not appear in a suit is not a good and sufficient cause within the meaning of S. 108. C. P. C., for setting aside an *ex parte* decree passed against a minor. There are different considerations which bear upon the matter. the question always being whether in what the guardian did he acted in the best interest of his ward. (6 C. L. R. 69 explained.)

Ajodhya Pershad Singh v Sheoi Pershad Sahu.
5 C W N 58.

Notes:-Ref: 24 All 383 F. B.=22 A W N 76; 6 C L J 326: 448.

(11) Written statement filed—Party not appearing-Whether decree is ex-parte.

1889—C P C. O. 9 r. 13=(1882 Sec 108)—Party not appearing on the adjourned date of hearing.

An application under sec. 108 of the Civil Procedure Code lies where for sufficient reason the party fails to appear on the adjourned date of hearing, even where a written statement has been already filed. (18 M. L. J. 51, 23 Cal. 738, 20 Bom. 380; 20 All. 195, Fol). **Muniappan Chetty v Balayan Chetty. 4 M L T 216= 31 Mad 505=19 M L J 226.**

(12) Decree who had shown sufficient cause should not have been set aside.

1890—C. P. C. O. 9. r. 13=(1882 S. 108)—Several defendants.-Ex-parte decree-Application to set aside by one defendant—Decree against all defendants set aside-Legality of the order.

Where a decree was passed ex-parte against several defendants and the whole decree was set aside under sec. 108, Civil Procedure Code on the application of one of the judgment-debtors.

Held, that the decree so far as it affected the defendants other than the applicant, who had shown sufficient cause within the meaning of s.

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

(6) Prevented by sufficient cause from appearing—*Contd.*

108 should not have been set aside. (26 Mad 604, 18 Bom. 142; 8 W. R. 260, 25 Cal. 155, 4 O. W. N. 456, 24 All. 383 Ref. and Expl) **Valia Konikkal Edathil Cheria Panji Achan v Marutha Veera Kavundan.** **4 M L T 230**

(13) Ground for setting aside decree wrongly attached.

1891—C. P. C. O. 9 r. 13 of 1908=1882 S. 108.

In an application to have an ex parte decree set aside, [illegible] judgment-debtor is entitled to say the property attached is not his. **Sookh Moyee Dossee v Nurmooda Dossee** **15 W R 210.**

See Radha Benode Chowdhry v Degumburee Dossee B L [illegible] Sup Vol 947.

Shib Chunder Bhadoory v Lukhee Debia Chowdhrain. **6 W R Mis 51.**

But he must prove the allegation **Kalee Prosad v Digumber Chatterjee.** **25 W R 72.**

in which case the proof was held to be insufficient.

C P C O 9 r 13—Grounds for setting aside of *ex parte* decree. **See 14 O C 111.**

(14) Defendant showing no sufficient cause for non-appearance.

1892—C P C O 9 r 13=S 108-Appearance by vakil—Ex-parte case.

One of several defendants in a suit did not enter appearance until nearly [illegible] month after the date fixed for the first hearing, when he applied by a vakil for leave to be heard in answer, under the last part of s 111, Code of Civil Procedure. In the absence of good and sufficient cause for previous non-appearance, his application was rejected and an *ex-parte* judgment given against him. After this he applied, at the instance of the Appellate Court, for a re-hearing on the ground that the summons had not been duly served upon him. This application was rejected and the order of rejection was upheld on appeal. In special appeal he contended that the case did not fall within s 119, and that he was entitled to have the regular appeal previously preferred determined upon the record as it stood, notwithstanding his prayer had been rejected under s, 113. *Held* that the mere fact of the special appellant having appeared by [illegible] vakil in the way mentioned above could not be taken as an appearance within the meaning of S. 119, and was not sufficient to prevent the Court from passing a judgment *ex parte* against him. **Mahomed Hossein v Muntozul Huq** **18 W [illegible] 400.**

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

(6) Prevented by sufficient cause from appearing —*Contd.*

(15) Insufficient reason for non-appearance

1893—C P C O 9 r 13=S 108 Ex-parte decision.

Where defendants, summoned under s. 41 of Act VIII of 1859, did not appear on the day fixed for them to appear and answer, and, their reasons for non-attendance not being considered sufficient, they were not allowed to appear in the case. *Held* that the lower Appellate Court was right in refusing to hear an appeal from that decision.

Joy Prokash Singh v Meghraj Singh **12 W R 207.**

7 COURT'S ORDER UPON SUCH TERMS AS TO COSTS.

1894—C P C O 9 r 13=(1882) [illegible] 108

Procedure— Costs—Exparte decree set aside—Carelessness of defendant to note date of hearing —Conditional order setting aside.

Where the defendants failed to note the date of hearing fixed in the summons and consequently did not appear at the hearing and an *exparte* decree was passed, his Lordship thought it necessary to make the order granting the application to set aside the decree conditional [illegible] the applicant paying plaintiff's taxed costs by a certain day.

Mc Carron v Welti **(1904) A W [illegible] 227.**

1895–C P C O 9 r 13=C P C (1882) S 108

Where on an application to set aside an ex-parte decree passed in a suit on a mortgage bond, whereby property is mortgaged for Rs. 60,00, which is presumably worth more than that sum, an order is made directing the ex parte decree to be set aside on the defendants furnishing security for Rs 10,000, and on their failure to do so, upholding the decree,

Held that the security required by the lower Court was excessive, and it was ordered that

C P C (1908) O 9 r 13=(1882, S. 108) - *Contd.*

(7) Court's order upon such terms as to costs—*Concld.*

the security be reduced to Rs. 1,000 to be furnished within a date from the month of the order and that, on such security being given, the case should be restored to the file for trial

Maung Sein v Armugam Chetty.
14 Burma L R 214.

1896—C P C O 9 r 13=(1882) S 108.

When a defendant applies within 30 days after process for executing the decree has been executed, for an order to set aside an ex-parte decree of a Small Cause Court, he is not bound to deposit in Court the amount decreed, but the Court has a discretion to pass an order as to costs. **Mamoola v Ram Gopal P R 59 of 1871**

1897—C P C O 9 r 13=C P C (1882) S 108.—

Setting aside ex-parte decree on condition of payment of costs.

Held, that an ex parte decree which has been ordered to be set aside on payment of costs within a certain time remains in full force until the payment of costs is made within the time fixed, and where the condition is not strictly carried out the order imposing it becomes inoperative.
Ghulam Muhammad v Tulsi Ram
60 P R 1904.

8 EXPARTE DECREE CAN BE SET ASIDE BY A REGULAR SUIT

1898—C P C O 9 r 13=S. 108 of 1882—

Suit to set aside exparte decree and sale thereunder—Fraud—Application to set aside exparte decree refused—Suit maintainability of—Civil Pro Code Ss. 108, 224, 244 & 311.— A suit lies to set aside an *ex parte* decree and the sale held in execution thereof on the ground of fraud, though an application to set aside the decree under s 108 C P C had previously been refused. **Radha Raman Shaha v Pran Nath Roy**
5 C W N 757=28 Cal 475, P C.

Notes.—Dist: 29 All 212=W N (1907) 31=4 A L J 51. Ref: 13 C W N 1197; 10 C L J 420: 10 C L J 336. Fol: 9 C L J 367=13 C W N 493. Ref: 29 Cal 395 P C=6 C W N 473; 5 C L J 385=34 Cal 241; 4 A L J 51.

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

(8) Exparte decree can be set aside by a regular suit—*Contd.*

1899—C P C O 9 r 13=C P C (1882) s.108.—Exparte decree—Practice—Suit set down for hearing before the date fixed in summons—Civ. Pro. Code. Ss. 68, 69, 96, 100, 101, 112 and 113—High Court Rules, Nos. 111 and 112.

The plaintiff is not entitled to have a suit set down for an *ex-parte* decree before the date fixed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. **Dhirajlal Panachand v Hormusji Edulji Bottlewala.**
10 Bom L R 301=32 Bom 534.

1900—C P C O 9 r 13 (=s.119, Civ.Pro.Code, 1859)—Execution of an ex-parte decree—No process for enforcing judgment—Application to set aside ex-parte decree.—

In the execution of an *ex parte* decree, the usual notice to show cause was issued to the defendant who being absent was not served. Upon the defendant's non-appearance, order was issued to carry out the execution of the decree. About a year afterwards the defendant applied under s. 119 of Act VIII of 1859 to set aside the *ex parte* decree urging that he had no notice either of the suit or of the execution of decree and that he was still in possession of lands. *Held* that no process for enforcing the judgment has been executed and consequently the application was not barred by time. **Moola Singh v Wasawa Singh.**
94 P R 1869.

1901—C P C O 9 r 13 (1908)=S 108 (1882)—-Ex parte deree—Satissfaction—Decree, setting aside of.

Satisfaction of an *ex parte* decree does not disentitle a judgment-debtor from applying to a Court to set aside. **Zendoolal v Kishorilal**
1 Bom L R 213=23 Bom 716.

1902—C P C O 9 r 13=C P C (1882) S 108.—Application to set aside ex-parte decree previous to plaintiff's suing out execution.—

Where the Lower Court declined to entertain defendant's application to set aside an ex-parte decree obtained against him upon the ground that such application could not be entertained until

(8) Exparte decree can be set aside by regular suit—*Concld.*

plaintiff had sued out execution of his decree, the Chief Court, on the revision side, set aside the Lower Court's order as erroneous, and directed him to dispose of defendant's application on the merits.- **Sirdar Gurbaksh Singh v Hurbuns.**
P R 152 of 1879.

1903—C P C O 9, r 13=(1882 S 108).

Ex parte decree under s. 90 of the Transfer of Property Act, application to set aside. An application made under s. 101 of the Code of Civil procedure to set aside an ex parte decree passed under s. 90 of the Transfer of Property Act is not maintainable. (6 O C 114) and (15 All 84). ref.
Gurdin Panday v Rai Gokul Chand.
9 O C 288.

9 ONUS OF PROOF.

1904—C P C O 9 r 13 (1908)=S.108 (1882)—Onus of proof on plaintiff.

When the onus of proof lies on the plaintiff, an ex parte decree can under no circumstances, be passed without proof. **Nanik Chand v. Jawahir Ali** **Old S C 9.**

10 EFFECT OF SETTING ASIDE AN EXPARTE DECREE.

(1) Whether affects decision of the case.

1905—C P C O 9 r. 13,=S. 108—Maintainability of objection against order setting aside exparte decree, in appeal against decree in suit ·Order setting aside ex-parte decree, whether affects decision of the case.-- **See—9 C W N 584.**

(2) Validity of attachment.

1906—C P C O 9, r 13 (1908)=S 108 (1882)—The effect of granting an application under s. 119 of act VIII of 1859 is to declare that there has not been yet a valid decree in the suit, and thereby any attachment that has issued in execution of the decree which has been set aside becomes invalid. **Lala Jagat Narayan v Tulsiram.**
I B L R A C 17.

(10) Effect of setting aside an exparte decree—*Contd.*

(3) Effect of order under S. 101 against a defendant and not appealed from on his right to apply to set aside exparte decree.

1907—C P C O 9 r 13 of 1908=1882 S 108-Exparte decree, effect, of setting aside-Summons serving of-Summons, when affixable to the outer-door.

Held; that notwithstanding the dismissal of his application under s. 101 C P C the defendant was entitled to apply under S 108 C P C to set aside the ex-parte decree and that the effect of setting aside the ex-parte decree under S. 108 C P C was to nullify the order that had been passed under S 101 C P C, so as to allow the defendant to appear and defend the suit.
(21 Bom 223 referred to) **Sankaralinga Mudali v Rathnasabapathi Mudali.** **8 M L J 58=**
21 Mad 324.

Notes—Ref 23 Mad 494. Dist 29 Mad 334.

(4) Effect of setting aside exparte decree and re-opening the decree.

1908—C P C O 9 r 13=S 108—Procedure-Ex parte decree—Co-defendants-Small Cause suit—Ex parte decree against one defendant-Application by co-defendant to set aside decree-Case re-opened with respect to the applicant only-Civil Procedure Code secs 106 and 108.—

Where a decree is set aside on the application of a defendant against whom it was passed ex-parte, the case is not re-opened as against a co-defendant who had appeared and defended the suit. **Manaku v Sitaram Atmaram Vagh.**
P J 1893 P 54.—18 Bom 142.

Notes--Not Fol 24 All 383 F B. Ref 6 C L J 236; 31 Mad 454; 18 M L J 543.

(5) Opening of the objection of the other party.

1909—C P C O 9 r 13 (1908)=S 108 (1882)—Opening of an exparte order can be re-opened on the objection of the other party.
Girwal Lal v Lakshmi Narayan 1904 A W N 24=26 All 327.

1910—C P C O 9 r 13=C P C S 108 (1882)—Exparte decree—Setting aside an exparte decree—Co-defendant in an exparte decree.—

When an exparte decree is set aside on the application of the defendant against whom it was passed the case is not re-opened as against a co-defendant who had appeared and defended the suit (11 W R 15: 8 W R 260; 7 W R 237; 20 W R 286, 18 Bom 142; 25 Cal 155 & 175; 4 C W N 456. *referred to*) **Lalji v Amtul Bashir. 15 C P L R 179.**

1911-C P C O 9 r 13 s 115=(1882 ss 108, 622).

Re-opening a suit without enquiry is a material irregularity within s 622.-Held in revision that the lower Court in having re-opened the case immediately after giving notice and without making any enquiry at all. failed to carry out the intention of the Legislature and acted in a manner in which S 108 did not authorise it to act.(U B R (1904-05) Civ. Pro. P 26 Ref).

Nga Tha Din Mi Tin v Nga Po Chan. U B R (1906) Civ Pro Code 42

(6) Exparte decree against one defendant —Right to open the whole case.

1912-C P C O 9 r 13=S 108—Act X of 1859-

When a suit has been decreed against several defendants, and one of them, who was not present at the hearing, obtains a re-hearing and files a written statement in which for the first time the objection is taken that the suit could not have been proceeded with, inasmuch as plaintiff had improperly joined two distinct causes of action against two different individuals, the Court is not justified in re-opening the whole case. S 119, Act VIII of 1859, does not contemplate the setting aside of that portion of the decree in such a case which refers to the other defendants. S. 58 Act X of 1859 treated as an authority by analogy in such a case and s 119 Act VIII o interpreted. **Huro Krishno Dass Moteechand Baboo. 8 W R 260.**

See however, **Nistarini Dossee v Debnath Bose, 20 W R 286**

and **Brojonath Surmah v. Anund Moyee Debia, 7 W R 237.**

1913.—C P C O 9 r 13=1882—Sectin 108—*Ex-parte* decree against two defendants—Relief against and defence by one distinct from refief against and defence by another-Application by one alone—Effect of, as regards the decree against another:—

Where an *ex-parte* decree is divisible, it is, though in form a single decree, equivalent to two decrees, and when on an application by one set of defendants who had a separate defence, it is set aside under S 108, C P C, it remains still a good and binding decree against the other set of defendants. **Moh Chandra Guha v Annada Charan Dutt. 6 C W N 109.**

Notes—Dist : 5 C L J 202. Ref 6 C L J 226.

1914—C P C O 9 r 13=(1882 S. 109).

Expart decree against some defendants—Decree one and indivisible—Ex—parte decree set aside—Decree set aside in its entirety.

In a suit for a sale on the basis of a mortgage, some of the defendants did not appear, while the rest contested the claim. Finally a decree was given against all the defendants, it being *ex-parte* against those who had not appeared. On the latter's application the *ex parte* decree was set aside, and, on rehearing the suit the Court restricted itself to the case of the defendants at whose instance the *ex parte* decree had been set aside. Ultimately a decree was passed against all the defendants, and, within three years of the last decree, the decree-holder applied for an order absolute.

Held, that the decree-holder's application was within time.

Held further, that the word "decree" in sec. 108, Civil Procedure Code, meant the whole decree made in the suit and that a decree could not be set aside in part. (24 All 383; 29 All 623; A W N (1907, 204; 4 A L J 552; 25 All 155; 1 C W N 652 Ref.) **Samodh Dhar Dube v Bhuladhar Dube 5 Ind Cas 284.**

1915-C P C O 9 r 13=(1882 S. 108)-Jurisdiction to enquire into subsequent fraud—Setting aside decree partially.

Where an *ex parte* decree is found to have been obtained without service of summons, and the record shows that it has been subsequently assented to, but the genuineness of such assent is disputed by the defendant, the Court has jurisdiction to investigate whether, in fact, there was any assent in order to enable it to decide whether any order ought to be made under . 108 for setting aside the decree.

C P C (1908) O 9 r 13=(1882 S. 108) -*Contd.*

(10) Effect of setting aside an exparte decree—*Contd.*

When a decree, passed *ex parte* against several defendants, is set aside and the case revived at the instance of one of them, under s. 108, the order does not necessarily revive the whole suit to the benefit of the other defendants whose prayer under the section has been heard and rejected. (25 Cal 155 Dist). **Kunja Behari Gose v Durgamoni Dassi.** **3 C L J 160.**

Notes—Ref: 6 C L J 226; 13 C W N 1197; 10 C L J 420=2 Ind Cas 129.

1916—C P C O 9 rr 13; 11=(1882 ss. 106, 108) - **Exparte decree order setting aside-Order obtained by one defendant, if enures to the benefit of all-Decree, if whole,set aside—Principles governing such cases.**

S. 108 of the Civil Procedure Code must be read with s. 106, and effect should be given to all the provisions contained in them.

It cannot be laid down as an inflexible rule of law, that whenever an order is made under s. 108 of the Code, the effect is to set aside the whole decree, although it may have been made against some of the defendants after the contest or although an unsuccessful effort may have been made by some of the defendants to set aside the *exparte* decree. It is not obligatory upon the court to set aside the whole decree and to re-open the suit under all circumstances.

Principles, which should be applied in determining whether the entire decree is to be set aside or whether it should be set aside only in so far as it affects the applicant, discussed and examined. (4 C W N 456, 8 W R 260, Ref. 25 Cal 5 Expl and Dist.) **Jadubansa v Mohunt Hari** **6 C L J 226.**

1917—C P C O 9 r 13=(1882 s. 108).

Exparte decree—One defendant, setting aside as to—Setting aside as to others.

In a case where an *ex-parte* decree was set aside against one of the defendants on his sole application, and the Subordinate Judge set aside the decree against others who did not appear; *held*, that this was rightly done. (25 Cal 155 approved of.) **Ajodhya Pershad Singh v Sheo Pershad Singh.** 5 C W N 58.

C P C (1908) O 9 r 13=(1882 S. 108) -*Contd.*

(10) Effect of setting aside an exparte decree—*Contd.*

Notes- Ref: 24 All 383 F B; 6 C L J 226; 448.

1918—C P C O 9 r 13=(1882 Sec 108)—Exparte decree, set aside at the instance of some of several defendants—Effect—Revival of the whole case.

Where the question involved in a case is whether the liability of the defendants is joint or several and in such case the *ex parte* decree is set aside on the application of some of several defendants, the entire decree is set aside, and the trial *de novo* ought to be a trial of the whole case in the presence of all the parties. (6 C W N 109, Dist., 25 Cal 55. Fol.) **Hari Das Karmakar.** **5 C L J 202.**

Notes – Ref 6 C L G 226

(7) Effect of a decree set aside at the instance of some only of several defendants against whom the decree passed was ex-parte

1919—C P C O 9 r 13=S. 108. of 1882.

In s. 108 the words "the decree" mean the whole decree made in the suit, therefore where a decree has been passed ex-parte against some only of the several defendants who apply to set it aside under s. 108 C P Code and it is set aside. The effect of the setting aside is that the whole decree made in the suit is set aside, even though some of the defendants had appeared on the day of hearing. **Mahomed Hamidulla v. Tohurennissa Bibi,** **25 Cal 155=1 C W N 652.** **Doyamoyi Dasi v Sarat Chunder Mojumdar** **25 Cal 175; 1 C W N 656.**

Notes.—Fol: 5 C W N 58, 5 C L J 202. Dist: 4 C W N 456; 3 C L J 160.

(8) Setting aside an exparte decree on condition of finding surety.

1920—C P C O 9 r 13 (1908)=(1882) S. 108.

An exparte decree was set aside on condition of the defendant's finding out a surety who should be liable for any amount that may be decreed to be due from the defendant by the new decree. *Held* - that under s. 108 Courts have jurisdiction to set aside an exparte decree on such conditions. **Sonatun Shaha v Dino Nath Shaha.** **26 Cal 222; 3 C W N 228.**

C P C (1908) O 9 r 13=(1882 S. 108) -*Contd.*

(10) Effect of setting aside an exparte decree—*Contd.*

Notes—Ref: 32 Mad 410 F B; 19 M L J 584 F B.

(9) Exparte order by Court-Setting aside of.

1921—C P C O 9 r 13=(1882) S. 108.

An act by Court shall prejudice no man and the opposite party has a right to question the act in proper time. (3 C B N S 833 foll.)
Balabai v Ganesh. **27 Bom 162 at 183.**

Notes—Ref: 1 C W N 584.

(10) Fraud.

1922—C P C O 9 r 13, S. 47=(1882 Ss. 108, 244).

If the decree is tainted with fraud, a suit will lie to set aside the execution sale, even though the decree may have been previously set aside under S. 108 of the Code of Civil Procedure, and there is no subsisting decree to be set aside in the suit, in which the sale is impeached.

(19 Cal 683; 21 Cal 605; 3 C W N 395, Ref 27 Cal 197, Ref. 31 Cal 179 and 4 C L J 475. Ref. 19 W R 90, 14 Cal 605, 22 Cal 483, 3 C W N 395, 18 All 106, Ref, 2 C W N 691, 26 Cal 324, Ref 5 C L J 71, Ref.) **Debendra Nath Bhattacharjee v Prasanna Kumar Chakravarti.**

5 C L J 328.

(11) Sale must be set aside when the decree itself is set aside.

1923—C P C O 9 r 13; S. 144 (1)=(1882 Ss 108, 583).

A sale held under the *ex parte* decree must be set aside when the decree itself is set aside; and if there be again a decree made against the defendant, the new decree is not a revival of the former decree, and the sale cannot be revived.
Roghunandan Singh v Jagdis Singh.
3 Ind Cas 30=14 C W N 182.

(12) Effect of a decree set aside at the instance of some only of several defendants against whom the decree was exparte.

1924—C P C O 9 r 13=S. 108-Decree upheld on appeal by the other defendants by District Court and High Court.

C P C (1908) O 9 r 13=(1882, S. 108) -*Contd.*

(10) Effect of setting aside an exparte decree—*Contd.*

Where a decree had been made by a Munsif against several defendants, only two of whom appeared and these two appealed from the decree both to the Subordinate Judge and to the High Court, the decree being upheld in both Courts; and the defendants, who had not appeared nor been parties to the appeals, applied to the Munsif and got the decree (*exparte* [illegible] against them) set aside altogether and the Munsif made an order allowing the two defendants who had appeared to defend the suit *de novo*:—It was *held* that the Munsif had no jurisdiction to set aside the decree as against the two defendants who had appeared; it was not an *ex parte* decree as against them, nor was it [illegible] decree of the Munsif's Court, but of [illegible] superior Court. S. 108 of the Civil Procedure Code contemplates the case of a Court setting aside its own decree, and not that of another and a higher tribunal. (25 Cal 155, distinguished.)
Monomohini Chowdhrain v Nara Narayan Roy Chowdhry. **4 C W N 456.**

Notes—Ref: 24 Cal 383 F B; 26 Mad 604; 6 C L J 226; [illegible] M L J 543; 31 Mad 454.

(13) Setting aside exparte order absolute for foreclosure.

1925—C P C O 9 r 13 (=Civ Pro Code, 1882, s. 108).

An *ex parte* order absolute for foreclosure may be set aside on application made therefor.
Amolakchand v Jawahir Mahomed
16 C P L R 92.

(14) Procedure on grant of new trial of exparte decree case.

1926—C P C O 9 r 13=S 108 of 1882.

Where the lower Appellate Court admitted an application under [illegible] 119 for re-trial of [illegible] case which had been decided *ex-parte* by the Munsif, it was held to have done right in sending for the record in order that the case as a suit should be heard and tried by the Appellate Court; the object of the law being that a suit should assume [illegible] complete form and go to a full trial, and not be divided between different Courts. **Khoob Lall Sahoo v Kadir Buksh.** **15 W R 431.**

C P C (1908) O 9 r 13=(1882 S. 108) -Contd.

(10) Effect of setting aside an exparte decree—*Concld.*

(15) Set aside exparte person and suit re-tried-Execution-Course to be followed-Practice.

1927.-C P C O 9 r 13=(1882 S.108.)-Mortgage —Decree for sale against three persons of whom one was exparte—Decree set aside as against exparte person and suit re-tried—Sum due on mortgage found to be less than in subsisting portion of the decree—Decree against a person for a larger sum and as against another for less.

Where a mortgage decree was obtained for sale of the mortgaged properties belonging to three persons and the decree was set aside in part as against the only person who was *exparte* and the case re-tried, and it was found by the court that a lesser sum than was originally found due to the mortgagee, was due to him, there having been no appeal by the other defendants, *Held*, that under the circumstances the only way of working out the decrees is to allow the sale to proceed as against the mortgaged properties of the persons against whom there was a decree for a larger sum and to allow the sale of the third man's properties only on default of the sale realizing the lesser sum found due on the re-trial. (24 All. 383 ref to.) **Shaida Husain v Hub Husain. 1902 A W N 189=25 All 42.**

Notes:—Ref 6 C L J 226.

11 APPEAL FILED—THE POWER TO SET ASIDE DECREE VESTS IN THE APPELLATE COURT.

1928.—C P C O 9 r 13=(1882 S. 108.)

After an appeal is filed against a decree of a lower Court, which proceeds on a ground common to all the defendants, the power to set aside the original decree on an application under S. 108, Civ Pro Code, 1882 by any of the defendants, against whom the decree was passed *ex-parte*, becomes vested in the appellate Court only, and the first Court does not continue to exercise jurisdiction in the matter.

A contention which involves a question of jurisdiction and an important point of law may be permitted to be taken for the first time in second appeal. (30 Mad 535; 17 M L J 436 Fol; 4 C W N 456, Dist.) **Dhanai Sardar v Tarak Nath Chowdhuri. 5 Ind Cas 525=12 C L J 53.**

C P C (1908) O 9 r 13=(1882, S. 108) - Contd.

(11) Appeal filed—The power to set aside decree vests in the Appellate Court-*Concld.*

1929.—C P C O 9 r 13=(1882 S. 108.)

Exparte decree—Application to set aside, if may be heard pending appeal by the defendant. The mere fact that an appeal has been preferred from an *exparte* decree and is pending does not preclude a defendant, against whom the decree was passed from applying under s. 108, C. P. C. (1882) for an order to set it aside.(12 C W N 885, *affirmed*) **Damadar Manna v Sarat Chandra Dhal. 13 C W N 846=3 Ind Cas 468.**

1930.—C P C O 9 r 13; O 41 r 21, S. 107 (2), O 22 r 11=(1882 Ss. 108, 560, 582.)

Application to set aside exparte decree after appeal by one of the defendants—Appellate Court's power—Limitation Act Arts. 164, 162.

If an appeal is filed by one of the defendants in a case, the proper Court to which an application under s. 108, C P C by an *exparte* defendants is to be made is the appellate Court. The power to pass an order under s. 108 is distinct from the power to set aside an *exparte* appellate decree under s. 560, C P C. Art 164 applies to any application which involves the setting aside of the original decree *i. e.* to any application under s. 108 whether made to the original Court or to the Court of appeal after an appeal has been filed; and Art. 169 applies only to applications "for rehearing of an appeal heard *exparte* in the absence of the respondent". Art.169 is wholly inapplicable to applications by a party who has never been served to set aside the whole proceedings in the suit and Art 164 is the article applicable to such proceedings. **Sankara Bhatta v Subraya Bhatta. 17 M L J 436=30 Mad 535.**

Notes:—Ref 32 Mad 416; 19 M L J 388=6 M L T 135; 2 Ind Cas 302; 5 Ind Cas 525.

12 APPEAL AGAINST ORDERS IN THIS SECTION.

(1) Applicability of s. 108—Appeal from Order.

1931.—C P C O 9 r 13; S. 104; O 43 r 1—=(1882 ss. 108, 588)—Applicability of s. 108 to execution proceedings—Inherent power of Court to set aside its own order.

(12) Appeal against orders in this section—*Contd.*

S. 108 of the Code applies to execution-proceedings. When therefore, an order was passed *ex-parte* in the execution proceedings, the order was one under S. 244 C P C and was a decree within the meaning of s. 2 of the Code, and if it was passed without service of any notice under s. 248 C P C upon one of the judgment debtors he may apply under s. 108 C P C to have the *exparte* order set aside.

An appeal would lie. under s. 588, cl (9) C P C from an order. dismissing an application under s. 108 of the Code on the ground that s. 108 of the Code did not apply to execution proceeding, if the application could be entertained under that section.

The Court has an inherent power to prevent an abuse of its processes and is competent to revise an order made in the absence of the opposite party and without service of notice upon him, which the law directs should be served. **Krishna Chandra Pal v Protab Chandra Pal. 3 C L J 276.**

(2) Appeal from exparte decree.

1932.—C P C O 9 r 13=S. 108. of 1882.

A suit was postponed on the application of the defendant's pleader, but on his applying for further adjournment at the time fixed for hearing, the application was refused; the Court tried the case, the defendant not appearing and not being represented, and gave a decree for the plaintiff. An appeal was allowed, and the case was sent back for retrial, **Amritnath Jha v Roy Dhunput Singh 8 B L R 44: 15 W R 503.**

Notes:— Dist 3 C L R 23.

(3) Appeal against ex-parte decree, arguments permissible in support of.

1933.—C P C O 9 r 13=C P C (1882) S. 108 —Exparte decree–Civil Procedure Code (Act XIV of (1882) Ss. 108 and 540.

Although a person against whom an *exparte* decree has been made, is entitled to appeal against it, instead of resorting to the procedure prescribed by S.108 of the Code, yet, his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *exparte* decree passed. He is not entitled to ask the appellate Court to accept the appeal on grounds which could be urged in an application under S. 108 and to remand the suit for rehearing it. (4 All 387; 17 Bom 733; 23 All 167. Ref [illegible] Cal 278; 23 Cal 738. Appr. 30 Mad 54. *dissented from.*) **Jadu Nath Basak v Ram Narayan 12 O C 25=1 Ind Cas 329.**

(4) Reversal of Judge's order by High Court.

1934.—C P C O 9 r 13=S. 108—Appeal.

A suit having been decreed *exparte* defendant applied for a revival thereof, under s. 119, Code of Civil Procedure. The application having been rejected, defendant appealed, and the first Court was directed to enquire whether there was sufficient cause for the non-appearance of the defendant. This was done, and the defendant was allowed to defend the suit. The plaintiff then appealed to the Judge, who reversed the last order. Both parties then went back to the Munsif, who, on 26th April 1867 recorded a proceeding that the original *exparte* order was to stand. In the meantime the defendant appealed to the High Court, which reversed the Judge's order. *Held* that the effect of the High Court's order was to render valid the Munsif's order admitting the defendant to defend the suit, and that no application for review was necessary on the part of the defendant. *Held* that the High Court's order, being a final decision by way of appeal on a question which arose in the suit, could not be interfered with, except by the Privy Council. **Nubo Kristo Mookerjee v Nadiar Chund Hattee. 12 W R 374.**

(5) Absence of defendant.

1935.—C P C O 9 r 13 of 1908=1882 [illegible] 108 —Ex-parte Judgment—Adjourned hearing—Civ Pro 1859 s 119.

The provision in this section that "no appeal shall lie from a judgment passed exparte against a defendant who has not appeared," must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, fails

C P C (1908) O 9 r 13=(1882, S. 108) –*Contd.*

(12) Appeal against orders in this section—*Contd.*

to appear on a subsequent day to which the hearing of the cause has been adjourned. **Zainul-Abdin Khan v Ahmad Raza Khan 2 All 67 P C; L R 5 I A 233**

Notes:—Ap 23 Bom 414. Fol: 11 C L R 537; 21 Cal 269. Dist: 33 Cal 738 F B; 7 All 538; 18 All 241; 20 All 195. Ref: 20 Bom 380; 8 All 354 F B; 5 C L J 247 F B; 34 Cal 403 F B; 11 C W N 329 F B.

(6) Appeal final—No appeal—Order affecting the decision of the final case.

1936.—C P C O 9 r 13=1882 S. 108-Order setting aside an ex—parte decree.

An order setting aside an *exparte* decree is final and it is not an order "affecting the decision of the case" within the meaning of s. 591, C P C and consequently cannot be set forth [redacted] [redacted] ground of objection in the memo of appeal against the decree in the suit. **Tassaduq Husain v Haiyat uu-nissa, 1903 A W N 39=25 All 280; 5 Bom L R 41=7 C W N 465.**

(7) Appeal from final decree.

1937.—C P O O 9 r 13; S 104; O 43 r.1; s. 105 =(1882 [redacted] 108, 588, 591).

Decree against several defendants *ex parte*—Application by one—Ground not common to others—Order setting aside against all—Where a plaintiff obtains a decree against several defendants *ex parte* and one of the defendants applies under S 108, C P C., to set aside the decree passed against him *ex parte* on a ground not common to the other defendants, the decree cannot be set aside [redacted] against such defendants. An order under S 108, C P C., setting aside the decree *in toto* as against all the defendants is not appealable under S 588, but may be questioned in an appeal against the final decree. *Quære.*—Whether an order setting aside the decree on the application of one of the defendants under S 108 will disturb the decree as regards the other defendants when the decree is passed on grounds common to all of them. (25 Cal 165 considered and explained. 24 all 383 referred to.) **Gopalu Chetty v Subbier. 13 M L J 308=26 Mad 104.**

C P C (1908) O 9 r 13=(1882, S. 108) –*Contd.*

(12) Appeal against orders in this section—*Contd.*

(8) Exparte has been passed in regular apppeal cannot prefer [redacted] special appeal.

1938.—C P C O 9 r 13 of 1908=1882 s 108.

A party to a suit against whom [redacted] judgment *ex parte* has been passed in regular appeal cannot prefer [redacted] special appeal from that judgment. He must first proceed under [redacted] 119 of the Civil Procedure Code to get rid of the *ex-parte* judgment against him. **Devappa Setti v Ramanadha Bhatt 3 Mad H C R 109.**

But **See Chinnappa Chetti v. Nadaraja Pillai 6 Mad H C R 1.**

Notes.—Diss: 20 W R 402. Not Fol: 6 B H C R 161. Disap: 6 M H C R 1. Fol 22 W R 537. Diss: 6 M H C R 1.

(9) Re-hearing expiration of, time limited

1939.—C P C O 9 r 13=1882 S. 108—*Ex parte* decree.—

Plaintiff obtained in 1873 the execution of [redacted] ex-paree decree obtained in July 1873. In November the defendant applied and obtained [redacted] rehearing. But his suit was dismissed on the merits. *Held*,—although s 119 of Act VIII of 1859 provides that an order for rehearing shall be final, it is final only in the sense that by itself it is not open to appeal and that the plaintiff is not precluded from raising the objection that the order for rehearing was made after the time limited therein and therefore ought to be set aside [redacted] made without jurisdiction. **Runglall Misser v. Tokhun Misser. 2 Cal 114; 25 W R 304.**

(10) Appeal from order refusing application under [redacted] 108

1940.—C P C O 9 r 13, O 41 r 23; O 45 r 1; Sec 109=(1882 ss. 108, 563, 564, 595 (a)—Ex parte decree—Remand under, s 562, C P C appeal from order of—S 562, C P C what can be remanded under—Final order—Interlocutory order.

In [redacted] appeal from an order refusing to set aside a decree under s 108 C P C on the ground that that section did not apply, the only [redacted] which can be remanded by the appeal Court to be tried on its merits, is the application under s. 108, and not the original case, the decree in which is sought to be set aside.

(12) Appeal against orders in this section—*Contd.*

Such order of remand is merely an interlocutory order relating to procedure and no appeal lies therefrom.

The mere fact that the High Court have certified the sufficiency of the amount and the value of the suit for an appeal the Privy Council cannot make appealable an order which does fulfil the statutary conditions. **Rai Radha Krishna v. The Collector of Jaunpore. 5 C W N 153 =11 M L J 65=28 Cal 442=28 I A 28 P C.**

(11) Decree setting aside exparte decree not appealed against

1941.—C P C O 9 r 13—Estoppel, by judgment.—Execution of decree—Decree dismissing a suit—Affirmance of decree by High Court—Application to set aside exparte decree.—

Where a suit for possession of land was dismissed by the Court of first instance, and on appeal the decree of the first Court was set aside in the absence of the defendant and a decree was given in favour of the plaintiff, but on appeal to the High Court, the latter set aside the decree of the lower appellate Court and restored that of the first Court, and meanwhile an application under section 108 of the Civil Procedure Code (Act XIV of 1882) to rehear the appeal was successful and a decree was drawn up in favour of the plaintiff in the presence of both the parties which was never appealed against, the court could not interfere with the execution of that decree as it had become final, no appeal having been preferred against it. **Mainuddin Talukdar v. Rammani Das. 9 C L J 460.**

(12) Appeal treated as application under s 108

1942.—C P C O 9 r 13; O 41 r 11 (=Civ Pro Code 1882, ss 108 and 551)—Ex parte decree—Application to set aside after confirmation on appeal—Rulings of the Financial Commissioner.

When an *ex parte* decree has been confirmed on appeal under s 551 of the Civ Pro Code, the decree of the Original Court must be regarded as having merged in the decree of the Court of appeal and the application under s 108 to set aside the *ex-parte* decree must be made to the appellate Court, in whose decree the decree of the lower Court has merged. (P L R Vol I p 407, 30 P R 1900;4 P R 1901, Fol,21 Bom 549,Not Fol; 24 Cal 759;11 All 819.3 Mad 1;11 All 267 Ref).When an *ex parte* decree was confirmed on appeal under s 551 of the C P Code, and the original Court rejected the petition filed under s 108 of the Code made to it subsequent to the dismissal of the appeal, and an appeal filed against the order rejecting the application was dismissed. *Held*, that the application made to the Original Court was rightly rejected, as it ought to have been made to the Appellate Court; and that the Appellate Court should have treated the appeal as an application made to it to set aside the *ex-parte* decree. It is expedient that the rulings of the Financial Commissioner, more especially on the technical points of law, should be in accordance with the rulings of the Chief Court of the Punjab. **Mahr Rana v Thaker Das. 33 P L R 1904 =8 P R 1903 Rev.**

(12) Appeal against orders in this section—*Concld.*

(13) Dismissal for default of Case in execution of decree.

1943.—C P C O 9 r 13=S 108—Appeal.

The remedy, when a case in execution of a decree is disposed of in the absence of the judgment-debtor, is that provided by s 119 of Act VIII of 1859, and not an appeal. **Sheetul Pershad v. Mahomed Kureem Khan 5 N W 164. Rajpal v Chooramun 4 N W 10.**

(14) Cases in appeal.

1944.—C P C O 9 r 13 of 1908=1882 s 108

S. 119, Act VIII of 1859, did not apply to cases in appeal. **Anonymous Case 1 Ind Jur O S 68. Ram Lal Chowdhry v. Surdaree Jah. W R 1864 Mis, 21. Omda Bebee v. Acowrie Singh 7 W R 425.**

13 COURT'S INHERENT POWER TO SET ASIDE EXPARTE ORDERS.

(1) Power of the Small Cause Court.

1945.—C P C O 9 r 13; S 14=(1882 ss 108, 647). Exparte order—Power of the Small Cause Court to set aside the order.

The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex-parte* and to set it aside

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

upon a proper cause being substantiated. **Tyeb Beg v. Allibhai** **8 Bom L R 808 =31 Bom 45.**

(2) Acting within the powers exercised a sound discretion

1946.—C P C O 9, r 13=C P C s 108—Costs—Discretion.

Where an order under s 108 of the Code of Civil Procedure was granted to a defendant conditionally on his paying certain costs of the plaintiff by a date fixed in the order, and where on the date so fixed, such costs not having been paid, the Court rejected the defendant's application. *Held* that the Court was acting within the powers conferred on it by s. 108 of the Code of Civil Procedure and had exercised a sound discretion. **Bhikhari Das v Jawahir Lal. 12 W N 216.**

(3) Restricted pecuniary jurisdiction to make a decree for a sum exceeding jurisdiction.

1947—C P C O 9 r 13 (1), (2) (1908)=Ss.108, 540-Account suit for-Preliminary decree, appeal against—Exparte decree, setting aside of—Final decree, appeal against, if can attack preliminary decree—Civil Procedure Code (Act XIV of 1882) Secs 108, 540—Power of court of restricted pecuniary jurisdiction to make a decree for a sum exceeding such jurisdiction—Court Fees Act (VII of 1870) sec 7 sub-sec IV cl (f) & sec 11—suits Valuation Act (VII of 1887) sec. 8.

The provisions of section 540 of the Civil Procedure Code make it clear that an *exparte* decree is appealable.

In an appeal against the final decree in a suit for account, the propriety of the preliminary decree may also be questioned.

In spite of the fact that an application under section 108 of the Civil Procedure Code has been unsuccessful, an *exparte* decree may be challenged, if there are good grounds, in a proper proceeding, for instance in a regular suit on the ground of fraud, the test being whether the refusal of the application under section 108 has already determined the question raised in the subsequent proceeding.

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

The dismissal of an application under section 108 or omission to prefer an appeal against such order of dismissal, does not bar another remedy on suitable grounds, and when the law provides an appeal against a decision, the effect of the omission to appeal is that the decision holds good for what it is worth. So far therefore, as concerns any other mode of relief available, the person who does not appeal, is in no worse position than if he had appealed and failed.

The jurisdiction of a Court is the authority to hear and determine a cause. Such authority is conferred by the sovereign power which organises the Court and is to be sought for in the general nature of the powers of the Court or in statutory provisions specially enacted for the purpose. To render the jurisdiction of a Court complete, it must have jurisdiction over the subject matter, that is, it must have power to deal with the subject involved in the action. This jurisdiction over the subject-matter can be given only by law and cannot be conferred by consent.

If a court of limited pecuniary jurisdiction therefore, takes cognizance of a suit in which the sum claimed is larger than the amount over which the Court has jurisdiction, any judgment it may give will be void.

The Court of the Munsiff is not competent to make a decree in a suit for accounts valued at less than Rs, 1,000 for an amount in excess of Rs. 1,000 which is the pecuniary limit of its jurisdiction. **Golap Sing v Indra Kumar Hajra. 5 M L T 360=13 C W N 493=9 C L J 367=1 Ind Cas 86.**

See also cases under.

(1) Account suit for.
(2) Jurisdiction.

(4) Power to deal with an application to set aside an order—Exparte.

1948—C P C O 9 r 13=C P C (1882) s. 108.—T P Act Ss. 87, 89—Mortgage—Order absolute for foreclosure or sale without notice to mortgagor—Application to set aside such order—S. 108 C P C to set aside the order.

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

An order absolute was made under S. 89 Transfer of Property Act, without notice to the mortgagor, the judgment-debtor. The judgment-debtor put in a petition, under s. 108, C P C, to set aside the order on the ground of absence of notice and of fraud and collusion on the part of the decree-holder. The subordinate Judge rejected the petition on the ground that there was no procedure setting aside an order making a decree absolute. On appeal to the High Court, the Divisional Bench that heard it dissenting from the view of the law taken in 29 Cal 644, referred the matter to a Full Bench. *Held*, that a Court has an inherent power to deal with an application to set aside an order of the kind in question made *ex-parte* and to set it aside upon a proper case being substantiated. The rule applied whether the order absolute was made under S. 87 or 89. Transfer of Property Act, (29 Cal 634, Diss). **Bibi Tasliman v Harihar Mahto.** **32 Cal 253 (F B) =9 C W N 81**

Notes.—Ref: 2 C L J 306 ; 7 Bom L R 961 : 10 C L J 492. Fol: 10 C W N 306 ; 8 Bom L R 803 ; [illegible] Bom L R 675 ; 35 Cal 767; 31 Bom 45. Dist: 4 C L J 317.

(5) Duty of Court before issuing notice to the opposite side.

1949—C P C O 9 r 13—Exparte decree, application to set aside.

When an application is made to set aside an *exparte* decree, the Court, before issuing notice to the other side, must ascertain whether or not the applicant had been prevented by sufficient cause from appearing when his case was called on for hearing. **Dollo v Sibla Kuar.** **[illegible] Ind Cas 31.**

(6) Power to remove receiver.

1950—C P C O IX, r 13; O 39, rr 1 to 3. O 40, rr 1 to 3—Court's inherent power to remove receiver—Cancelment of *exparte* order appointing Receiver—Refusal to hand over property to Receiver—Practice—Temporary injunction—Duty of Court. See **4 L B R 356.**

(7) Jurisdiction of District Judge to re-open an exparte decree.

1951—C P C O 9, r 13=Section 108—Decree exparte—Jurisdiction of District Judge to re-open an exparte decree which was appealed against to the Chief Court by the plaintiff.

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

In a suit where the plaintiff on obtaining an *ex-parte* decree for the major portion of his claim had unsuccessfully appealed to the Divisional Judge and the Chief Court as regards the portion disallowed, the District Judge, on the application of the defendant, after the decision of the Chief Court, re-opened the case under Section 108 of the Code of Civil Procedure.

Held, that under Section 108 of the Code the only Court which had jurisdiction at the time the application was made, was the Chief Court, and that the action of the District Judge in setting aside a decree which in point of law was no longer existent at the time was altogether *ultra vires* and void. **Sayad Zahurul Hassan v Gandu Mal** **4 P R 1901.**

(8) Jurisdiction to hear the application —Pendency of the appeal.

1952—C P C O 9 r 13=(1883) s. 108)

Hearing of application under, during pendency of appeal.

Where after preferring an application for setting aside an *ex-parte* decree under s. 108, C P C the defendant preferred an appeal against the decree.

Held, that the first Court had jurisdiction to hear the application during the pendency of the appeal. (9 W R 301;27 Mad 602, Ref: B L R F B R p 362. 36 W Va 384=14 S E; 7 *relied on*) **Sarat Chandra Dhal v Damodar Manna.** **12 C W N 885.**

Notes—Affirm: 13 C W N 846.

(9) Court to remand suit for re-hearing.

1953—C P C O 9 r 13=C P C (1882) Ss. 108, 552, 563, 564, 885, and 640—Ex parte decree—Power to appellate Court to remand suit for re-hearing on grounds other than those specified in S. 562.

When a suit is decided ex-parte, an appellate Court has jurisdiction, in an appeal against the decree so passed to reverse the decree of the court of first instance, on the ground that the first

C P C (1908) O. 9 r.13=(1882, S.108) -*Contd.*

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

Court was wrong in proceeding to decide the suit *ex parte*, and to remand the suit for rehearing such order of remand not being passed under s. s. 562 or for any of the reasons mentioned therein (23 Mad 445; 23 All 167 fol: 17 Bom 733; 23 Mad 260 not followed. 23 Cal 738; 25 Mad 447;28 Mad 437 and 12 All 510 Ref:) **Sadhu Krishna Aiyar v Kuppon Iyengar** **1 M L T 268 F B =16 M L J 479=30 Mad 54**

Notes:—Diss: 12 O C 35; Ref: 6 C L J 547= 12 C W N 590.

(10) Jurisdiction—Challenged in appeal against final decree

1954—C P C O 9 r 13, S. 105=(1882 Ss. 108 591) Ex parte decree affirmed in appeal--Application to set it aside.

When a decree originally passed by the Court of first instance is affirmed in appeal, the decree of the appellate Court becomes the decree in the cause, and the Court of first instance has no jurisdiction to entertain an application to set aside that decree.

A decree passed ex-parte against one of the defendants was affirmed on appeal of the defendants who had appeared. On the application of the defendant who had not appeared, the Court of first instance set aside the decree. *Held* that the Court acted *ultra vires*, and the appellate Court could set it aside when an appeal was filed against the final decree, the orders referred to in S. 591 of the Code of 1882 being orders which the Court has jurisdiction to make, but in making which it commits an error or irregularity. (5 Ind Cas 525, Ref:) **Palakdhari Rai v Mankaran Rai.** **7 A L J 588=6 Ind Cas 203.**

(11) Non-appearance of defendant after filing written statement.

1955.—C P C O 9 r 13=S 108=S 119 of Act VIII of 1859.

A defendant filed a written statement in a suit, and, when the case was called on for final disposal, an application was made by counsel on his behalf for an adjournment; but the application was refused, and no one appearing for him, the case was proceeded with, and a judgment was obtained by the plaintiff. The defendant afterwards applied for an order setting aside the judgment on the ground that he was prevented from appearing when the suit was called on. *Held* that the application was within s 119 of Act VIII of 1859, and the Court had no power in granting the order to impose terms as under section 111. **Administrator General of Bengal v Lala Dyaram Doss.** **6 B L R 688.** **Dayal Mistree v Kupoor Chand.** **4 Cal, 318=3 C L R 482.**

Notes:—Not Fol: 11 C L R 537. Ap: 4 Cal 318; 23 Bom 414. Dist: 23 Cal 991, Ref: 3 All 67 P C; 7 All 538;11 C W N 329 F B, 34 Cal 403, F B; 5 C L J 247, F B.

(15) Power to restore an ex-parte decree once set aside.

1956.—C P C O 9 r 13; O 17 r 3=(1882 Ss 108, 158)—Ex-parte decree set aside—No restoring of the decree as such—Default of party to produce evidence—Procedure.

A Court has no power to restore an *ex parte* decree once set aside. Where the Court is acting under section 158, the proper course for it is to decide the suit as it stood then before it if the Judge could do so, and not to "restore" the *ex-parte* decree once set aside by it. **Raman Chetiar v Mohideen Sahib.** **17 M L J 81.**

(13) Jurisdiction to set aside the personal deree against defendants.

1957.-C P C O 9 r 13=(1882 Sec 108)-Scope of—'Ex parte' decree—Setting aside on an application of one of several defendants on sufficient cause being shown, effect of:—Per Abdul Rahim J.

In setting aside an exparte decree on the application of one of several defendants, the Court has no jurisdiction to set aside the decree against defendants other than those who have sufficient cause except in so far as the decree is one and indivisible. Per *Munro J.*—The object of S 108, C P C, is that a successful applicant should be put in exactly the same position as if no decree had been passed in the suit, and the decree must

C P C (1908) O 9 r 13=(1882, S.108) -Contd.

(13) Court's inherent power to set aside ex-parte orders—*Contd.*

therefore, be set aside only [illegible] far as it is necessary to achieve the object, and no further. The decree in the case was against three defendants personally and the Devaswom property. The third defendant applied to set aside the *ex parte* decree passed against him. *Held* per *Curiam.*—That the Court had no jurisdiction to set aside the personal decree against defendants 1 and 2 and that the decree should have been set aside only in so far as it affected the third defendant and the Devaswom property, it being competent to third defendant to attack the decree in so far as it made the Devaswom property liable.

Panji Achan v Marutha Veere Kavundan. 18 M L J 543=31 Mad 454.

1958.—C P C O 9 r 13, Sec 114. O 47 r 1=(1882 Ss 108, 623.)

Where a suit, against four defendants was dismissed after being contested by defendants No. 1 and 2 only, and on appeal a decree was passed against defendants Nos 3 and 4, who had been made parties to the appeal.

Held, that the first Court had no jurisdiction to revive the suit, upon an application of defendants Nos. 3 and 4 under s 108 or 623 of C P C 1882. **Biswambhar v Sarup Chandra 1 Ind Cas 136.**

(14) Power to re-open question order.

1959.—C P C O 9 r 13. Sec. 105=(1882, Ss. 108, 521)—Rule discharged by High Court—District Judge—Order setting aside exparte decree—Appeal.

An *ex-parte* decree was set aside under section 108 of the Code of Civil Procedure by the Munsiff. A rule to set aside this order was discharged by the High Court. Subsequently on appeal from the final decree, the District Judge set it aside on the ground that the order under section 108 was not proper.

Held, the District Judge had no jurisdiction to consider the propriety of the order, after the discharge of the rule by the High Court (22 Cal 981; 25 All 280 Foll).

Held further :—It was not open to the plaintiff to challenge the validity of the order in an appeal against the final decree. Section 591 of the Code of Civil Procedure, has no application to such [illegible] case. **Mussamut Kariman v A H Forbes. 8 C L J 308.**

(15) Decree under S 143 Civil Procedure Code.

1960.—C P C, O r 13 of 1908=1882 S 108.

S 119 of Act VIII of 1859 did not empower [illegible] Judge to set aside a decree passed under s 148 of the same Act. **Comalamal v Ramasawmy Iyengar. 4 Mad H C R 56.**

Notes—Fol 6 M H C R 262. Dist: 4 M H C R 251; 1 Mad 287. Ref: 10 Mad 270; 272; 34 Cal 235; 5 C L J 260; 18 M L J 81. Disap 19 M L J 760.

(16) Ex-parte decree passed on appeal.

1961.—C P C O 9 r 13=S 108—Procedure.

M sued A and others on a bond-debt, and obtained a decree against A alone. He appealed to the District Judge, who passed a decree declaring all parties to be liable jointly. On the decree-holder taking out execution, two of the defendants applied to the Subordinate Judge under Act VIII of 1859, S. 119; and their application being rejected, they applied to the District Judge who referred them to the High Court. *Held* that the Subordinate Judge had no jurisdiction, but the proper course for the parties was to apply to the District Judge under section 119.

Zimutunnissa Bibee v Muddun Mohan Pal 22 W R 537.

(17) Power of original Court

1962.—C P C O 9 r 13=S 108 and section 567—Ex-parte decree confirmed on appeal—Power of original Court to subsequently set aside such decree.

Held, that an ex-parte decree which has been confirmed [illegible] appeal becomes merged in the decree of the Appellate Court and cannot thereafter be set aside by the Court which originally passed it. **Mehdi v Bahadar 30 P R 1900**

Notes.—Ref 48 P R 1906. Fol 8 P R 1903. Rev Cited 123 P R 1907=3 M L T 63=82 P W R 1907; 68 P R 1905=59 P R 1905

14 ORDERS UNDER THIS SECTION ARE SUBJECT TO REVIEW.

(1) Trial on merits

1963—C P C O 9 r 13 O 41 r 23=(1882 ss 108, 562)—Rehearing—Remand of case.

In an application under sec. 108 of the Civil Procedure Code on the grounds of fraud and suppression of summons, the Munsiff rejected the application holding there was no fraud and no suppression. On appeal the District Judge passed the following judgment.

“ This was an application under sec. 108, Civil Procedure Code. After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly that the appeal be allowed and the suit be remanded to the lower Court for trial on its merits.”

Held this was not a proper judgment. The case having been in fact tried on the merits the District Judge had no jurisdiction to remand it, but should have come to a conclusion on the evidence. **Sonaulla Sarkar v Beakul Mandal 7 C L J 379.**

(2) Absence of pleader.

1964—C P C O 9 r 13 of 1908=S 108 of 1882.

Where, in the absence of a plaintiff's pleader, the case was decided, it was held to have been decided *exparte*, and his proper course was held to be an application for review, not a special appeal. **Beejoy Gobind Sircar v. Radha Benode Misser 10 W R, 348.**

(3) Revision.

1965—C P C O 9 r 13=C P C S 108—Order restoring application.

Held, that no application would lie for revision of an order under s 108, Code of Civil Procedure restoring a suit to the file of pending suits. **Kalian v. Begam 18 W N 73.**

1966—C P C O 9 r 13=S 108–Civil Procedure Code, Section 622—Order under Section 108 of the Code setting aside an ex-parte decree—Revision.

An application was made to revise an order made under Section 108, Civil Procedure Code, setting aside an *ex-parte* decree, such order being made nearly seven years after the date of the decree.

Held, following 114 P. R, 1883, that no application under Section 622 of the Code would lie, the suit was one in which an appeal would lie, and by the word “ case” the whole suit is meant. **Hassan Ali Shah v Salig Ram 125 P R 1892.** (**But See 60 P R 1897, F.B**)

Notes:—Ref 16 P R 1903.

1967-C P C O 9 r 13-Exparte order-Mortgage suit.

If an order absolute is made *ex-parte*, the Court may, on grounds analogous to those stated in S. 108 of the Code, set it aside and resume the proceedings *inter partes*. It is also open to review and revision in the same way; and at least one appeal is generally allowed in respect of it. **Seth Bagwandas v. Shridhar. 3 N L R 55.**

1968—C P C O 9 r 13; O 47 r 1=(1882 Ss. 108, 350 and 623).

Insolvency proceeding—Ex-parte order, setting aside of—Review.

Section 350 of the Civil Procedure Code contemplates that on the date fixed for hearing the Court shall examine the judgment debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out.

If the objector had no notice of the application for insolvency, he is entitled to apply under S. 108 of the Civil Procedure Code to set aside an ex *parte* order passed under S.350 of the Code; but if notices had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *exparte* under S. 350, he is entitled to make an application under S. 623 of the Civ Pro Code to set aside the *ex-parte* order on the ground that it was contravention of S. 350. **Mool Chand Ram v. Sarjoog Pershad 7 C L J 268.**

(4) Ground for setting aside exparte decree.

1969—C P C O 9 r 13=S 108—Order for review.

Where after an *ex parte* decree defendant appeared earlier than fifteen days after service of

C P C (1908) O 9 r 13=(1882, S. 108) -Contd.

(14) Orders under this section are subject to review—*Concld.*

process, and swore that no summons had been served on him in the case which led to the *ex-parte* decree, and that the contract under which the case had been decreed against him had been broken by the plaintiff himself, it was held that good and sufficient cause was shown for defendant's previous non-appearance, and a *prima facie* case had been made out to lead to the conclusion that there had beed failure of justice. *Held* that, as this evidence was given in the presence of the mooktears on both sides, the Court's order that the case should be entered on the register of cases was [illegible] proper order admitting the review.

Anund Moyee Dassee v. Anund Soondur Mozoomdar. 13 W R 237.

15 LIMITATION FOR AN APPLICATION UNDER THIS SECTION.

1970—C P C O 9 r 13=1882 S. 108-Exparte decree against more defendants than one-Execution against some of the defendants—Application by other defendants—Setting aside decree—Limitation:—Where an *ex parte* decree is passed against more defendants than one, and the decree is executed against one of them only then that is not an execution of process for enforcing judgment against the others within the meaning of Art. 164 of Sch II of the Limitation Act, 1877. The latter can therefore apply to have the *ex-parte* decree set aside within 30 days of the date of any process in execution against them. (1888) P J 56 foll.) **Hanmant v. Shankar** [illegible] Bom L [illegible] 323. 31 Bom 303.

1971—C P C O 9 r 13=S 108—Money paid into Court—Exparte decree upheld—Application by decree-holder for payment of deposit—execution of decree—Limitation Act, 1877, 2nd Schedule, Article 179.

When [illegible] sum of money is paid into Court under Section 108. Civil Procedure Code, in order to be delivered to plaintiffs, should the *ex-parte* decree be upheld, such sum becomes the decree-holder's money [illegible] soon as the *ex parte* decree is upheld, and it is not necessary for him to apply for execution of the decree in order to obtain payment of the money.

Where, therefore, in such a case the decree-holder applied for payment of the deposit more than three years after the decree was passed,

C P C (1908) O. 9 r. 13=(1882, S.108) -Contd.

(15) Limitation for an application under this section—*Concld.*

Held, that such application could not be considered an application for execution of decree, and was not barred under Article 179 of the 2nd Schedule to the Limitation Act. **Inayat Ali v. Lachman Singh** [illegible] P [illegible] 1898.

16. MISCELLANEOUS CASES

(1) Legal right to bring the suit

1972—C P C O 9 r 13=C P C (1882) S 108. Exparte order—Jurisdiction—Legal right to bring a suit—Considerations of policy and expediency. The legal right to bring a suit, and to have it determined by the proper Court created for the purpose of determining such suits cannot be barred upon the considerations of policy or expediency. **Sri Vikrama Doe v Gunapuram 7 Bom L R 97=2 A L J 135=9 C W N 257 =28 Mad 42=32 I A 45 (P C).**

1973—C P C O 9 r 13 of 1908=1882 S 108—Fraudulent personation.

Where a party applies, under s. 119, Code of Civil Procedure, to have [illegible] *ex-parte* decree set aside, on the allegation that the decree was obtained upon a petition of confession of judgment put in by a person fraudulently employed to personate him, the Court is bound to enquire into the truth of the allegation, and, if it be established, the decree may be set aside. **Koroonamoyee Dassee v Nobo Kishore Sein 6 W R Mis 36.**

Notes:— Fol: 3 C L J 158.

1974—C P C O 9 r 13=S. 108 (1882).

Application to set aside ex-parte decree—Transfer of officer who passed the decree—Punjab Courts Act, 1884. Sections 17, 28, 35.

The *ex-parte* decree which the defendant wished to have set aside was made by C, [illegible] special Judge, invested with the powers of a Munsif in the Jullundur District. An application was made to S., another officer invested with the same powers and rejected [illegible] the ground that he was C.'s successor.

Held, that the order was wrong under Section 17 of the Punjab Courts Act, a Court designated as the Court of the Munsif had been established at Jullundur which continued to exist notwithstanding C.'s transfer. The application was made

C P C (1908) O. 9 r.13=(1882, S. 108)
-Contd.

(16) Miscellaneous cases—*Contd.*

to that Court and could be dealt with by any officer directed to do so under the rules for the distribuion of business. **Kutab-ud-din Rupa**
158, P [illegible] 1890.

(2) Right of party who has not come in to the benefit of order of dismissal of suit.

1975—C P C O 9 r 13=S. 108 (1882).

A suit having been decreed against [illegible] number of defendants, some of whom did not appear, one (R) of the latter applied for [illegible] new trial under s. 119, Act VIII of 1859, and the case was remanded by the Judge to the Sudder Ameen. On the last day of the new trial, another (K) of the defendants, against whom judgment had been given *ex-parte*, tendered a written statement, in which it was alleged that summons had not been duly served upon her. The statement was received, and the suit was dismissed *in toto*. In appeal, the Principal Sudder Ameen reversed that part of the decree which related to K, on the ground that she had presented no petition in conformity with s. 119 of the code. *Held* that K was properly before the Sudder Ameen's Court and was entitled to the benefit of the order of dismissal, and that the Principal Sudder Ameen went [illegible] too narrow a ground, and should have tried the case on its merits. **Kooroonamoyee Debia v Nubokishen Mookerjee** **11 W R 18=**
2 B L R 207.

1976—C P C O 9 r 13=C P C (1882) [illegible] 108

Held, that the application was wrongly rejected. The defendant should have been leniently treated specially because the plaintiff had given his consent to the grant of the application.
Partap Singh v Narain Das
159 P L R 1905=72 P R 1905.

1977—C P C O 9 r 13, O 21 r 89=(1882—Ss. 310 A, 108)—Valid deposit—Subsequent petition to set aside decree and application to retain the deposit until disposal of petition. Where deposit was made under s. 310 A, C P C within proper time for setting aside the sale and *subsequently* an application was made to the Court praying that the money deposited might be retained in Court pending the hearing of an application which had been made under S. 108 C P C, to set aside the decree.—*Held*, that the sale ought to have been set aside and the Lower court was wrong in refusing to set aside the sale. (C 1 W N 132 distinguished.) **Hanoomansingh v Luchmansahoo** **8 C W N 355.**

—O 9 r 13—Summons not duly served

See C P C O 9 r 6. Case No 1730
6 A L J 45.

—O 9 r 13—Guardian for suit to be appointed by court for minor defendant.

See C P C (1908). *Case* No (2846)
(1902 A W N 76.

—O 9 r 13—See C P C (1908) S [illegible] Case No (9)
28 Cal 81.

—O 9 r 13—Dismissal of suit for plaintiff's non-appearance.

See C P C O 9 r 8. Case No 1753.
31 Cal 150.

—O 9 r 13—When Summons duly served

See C P C O 9 r 6. Cases Nos 1724, 1725.
36 Cal 189, 23 All 99.

—O 9 r 13—See C P C (1908) S. 2 cl 2 **Case** No (28) **3 C L J 276.**

—O 9 r 13—See C P C O 9 r 7. Case No 1737. **10 C P L R 45.**

—O 9 r 13—Application to retain the deposit until disposal of petition.

See C P C (1908) O 21 [illegible] 89. Case No (2615).
8 C W N 355.

—O 9 r 13—See C P C O 9 r 11 Case No 1824
[illegible] C W N 621.

—O 9 r 13—Applicability and Scope.

See C P C O 9 r 9. Case No 1789.
26 Mad 599.

—O 9 r 13—Order Setting aside [illegible] **exparte** decree no appeal lies from

See C P C O 43 r. 1 Case No 3165.
103 P R 105.

C P C O 9 r 14 O S r 1 S 115. See Revision. **[illegible] O C 216**

C P C (1908) O 9 r 13=(1882 S. 108) *-Concld.*

(16) Miscellaneout cases *—Concld.*

(S) Whether an auction-purchaser is a necessary party to an application to set aside an exparte decree.

1978—C P C O. 9 r 14=s.108-Certain property was sold in execution of an exparte decree.

The judgment-debtor has applied to set aside the decree and made the auction-purchaser a party to the application. He is not a necessary party as he does not come under the description of " opposite party" in s. 109 of C P Code.

Jotindra Mohan Poddar v Srinath Roy. 26 Cal 267.

1979—C P C O 9 r 14=(1882 sec. 109) "Opposite Party"—Attaching creditor of decree—Notice not necessary.

An attaching creditor of a decree has no interest in the decree within the meaning of s. 373. Civil Procedure Code and when his name does not appear on the record he is not an "opposite party" within the meaning of s, 109 Civil Procedure Code so as to be entitled to apply for execution.

Obiter:—He is a representative of the decree-holder for purposes of execution within the meaning of sec. 244 Civil Procedure Code 1882, and is entitled to apply for execution. 20 All 88; 29 Mad 311 Ref. **Sevugan Chetty v Obla Munisami Aiyer. 8 M L T 237=20 M L J 524=7 Ind Cas 66.**

C P C O 10 r 1=S. 117 of 1882.

Notes:—This rule corresponds to section 117 of the C P Code, 1882, with some change in the language and phraseology, but without any change in the meaning.

—O 10 r 1—Dismissal of suit for plaintiff's non-appearance. **See** C PC O 9 r [illegible] Case No 1757. **33 Bom 475.**

C P C (1908) O 10 r 1=(1882) s. 117

See Plaint—Rejection of plaint. **A W N (1905) 170.**

1980—C P C O 10, r 1=(1882, s. 117=1877, s. 117)—Remand for retrial for non-compliance with provisions of.

Where the parties were not properly examined in the manner provided for by s. 117 of the Code and there was an abuse of written statements, the case was remanded to the Court of first instance for retrial. **Dullichand v Ajudhia Pershad. 9 C P L R 11.**

C P C (1908) O 10 r 1=(1882 S. 117) *-Concld.*

1981—C P C O 10 r 2 (1882 s. 118)—Statement made under—Not to be regarded as deposition.

S. 118 was a provision merely to enable the Court to ascertain what were the questions in controversy between the parties and was not intended to be in substitution for the regular examination on oath. Any statement made by a party while being examined under that section was binding only on the person who made the statement. **Janki Prasad v Arku Lal. 2 A L J 777.**

1982A—C P C O 10 r 2=1882 ss. 118, 119 (1859 s. 125)-Non-appearance of defendant-Appearance by pleader.

Where defendants summoned under s. 41, Act VIII of 1859, did not appear on the day fixed for them to appear and answer, and their reasons for non-attendance not having been considered sufficient, they were not allowed to appear in the case, —*Held*, that the Court of first instance was justified in disposing of the case in their absence, and that s. 125, Act VIII of 1859, contemplates a case in which a party who has appeared at the proper time afterwards appears by pleader. **Joy Prokash Singh v Meghraj Singh. 12 W R 207.**

—*C P C* **O 10, r.** [illegible] **O 14, rr 1, 2, 3—See**—Practice and procedure,

-C P C O 10 r. 2-See Rules of High Courts and Supreme Courts, Bombay.

C P C O 10 r 4=S. 120 of 1882.

Notes:—This rule corresponds to section 120 of the C P Code, 1882, with some additions and alterations. The word "where" has been substituted for the word "if" in the beginning, and the words *"or any such person accompanying a pleader as is referred to in rule* 2, have been added after the words "by a pleader" in sub-rule (l).

1983—C P C O 10, r 4, O 3, r 1, O 7, r 15=(1882 Ss.120, 36, 60)—Order appealable-S. 588-Omission to mention—Order directing party to appear in person.

The Subordinate Judge ordered some of the defendants to appear in person in his Court without mentioning the section under which, the order was made. *Held*, that the order was an order under S 120 C P C. (1882).

Where a Court purporting to act under the Civ. Pro. Code passes an order for the personal appearance of a party, but omits to quote the section under which the order is passed, held, that such an order is open to appeal. **Abdul Jalil v Humera Bibi 6 A L J 340=2 Ind Cas 463.**

1984—C P C O 10 r 4=S. 120—Appeal—Civil Procedure Code, s. 588, cl. 10-Personal attendance of plaintiff.

A sued B and C for Rs. 97 on a mortgage-bond. The defence was part satisfaction which was endorsed by plaintiff on the back of the bond. A decree having been passed in favour of the plaintiff for a smaller amount than sued for (Rs. 56), plaintiff appealed. The Appellate Court remanded the case for the trial of an issue relating to the genuineness of the endorsement on the back of the bond sued upon. The first Court, in course of the trial upon remand directed the personal attendance of the plaintiff to answer to the genuineness of a letter produced by the defendants. The order was set aside in appeal. *Held*, that no appeal lies from an order passed under the first paragraph of s. 120. Held, that the order under s. 120 of the Civil Procedure Code, from which an appeal is allowed by s. 588, cl. 10, is an order under the second paragraph of s. 120. **Ram Charan v Lala Shambhu Nath. 3 O C 31.**

1985—C P C O 10 r 4=S. 120—Inability of pleader to answer material questions-Materiality of absent witnesses.

Instead of dismissing plaintiff's suit on account of his pleader's inability on the day of trial to prove which of his absent witnesses against whom he had applied for further process to be issued, were material, the proper course for the Judge was to allow the plaintiff a certain time to produce evidence upon this point, upon payment by him of all the cost of adjournment. **Pearee Mohun Bose v Hurish Chunder Ghose 17 W R 141.**

1986—C P C O 10 r 4=S. 120 of 1882.

Issues having been settled, the plaintiff was summoned at the instance of a defendant to attend the Court and give evidence on his behalf on the day fixed for final hearing. The plaintiff refused to attend on the ground that on account of his rank he was exempted from personal attendance. The first Court considering the personal appearance of the plaintiff necessary issued an order under s. 120 of the Civil Procedure Code, that he should attend and on his failure to do so passed a decree against him. The High Court in second appeal held that the lower appellate Court was right in holding that under the circumstances the order and the decree of the Court of first instance were alike illegal, as the plaintiff having appealed by a pleader the Court had no power to issue an order under the section unless the pleader had refused or was unable to answer a material question. **Satu v Hanmantrao Gopalrao Nimbalkar. P J (1890) 217=23 Bom 318.**

1987—C P C O 10 r 4=(1882 s.120)—Court—Questions-Pleader.

The power vested in a Court under s. 120 of the C P C 1882, are discretionary. The intention of the section seems to be to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also if possible to get admissions so as to narrow down the issues. **Bhimrao v Venkatrao. 5 Bom L R 687**

C P C (1908) O 10 r 4=(1882, S. 120) -Concld.

1938—C P C O 10 r 4=S. 120 of 1882.

An application to raise an attachment was dismissed because the objector was absent on the adjourned day of the hearing.

Held, that, under s. 120 there ought to have been an inquiry whether the objector was absent without lawful excuse. **Deochand v Bhawani. 1896 P J 628.**

1939—C P C O 10 r 4=S. 120 (1882)=S. 127 (VIII of 1859)—Dismissal of suit on inability to answer material questions.

The plaintiff's mooktear being unable to answer certain questions necessary for the statement of the proper issues, the plaintiff was called upon either to appear personally and reply to the Court's queries, or to send some one who could reply. Having done neither,—*Held*, that the lower Court was competent to dismiss the suit under s. 127, Act VIII of 1859. **Nilmonee Singh Deo v Ram Huree Misser. 2 W R 161.**

C P C O 11 r 1=(1882) S. 121.

Notes—This rule corresponds to s. 121 of the C P Code 1882, with several additions and alterations. It follows English Or. XXXI, r 1.

"The provisions in the Code as to discovery are based on the rule of English procedure in force at the time when it was passed. Since then the English procedure has been amended and is now contained in Order XXXI. This Order has in effect been adopted in the rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has, it is believed, been found to work satisfactorily in practice.

On the other hand, in Mufassil Courts little use has yet been made of the machinery of discovery and the Committee therefore think the rules of the Calcutta and Bombay High Courts on their original sides, may be safely adopted without risk of disturbing a procedure with which the Mufassil Courts have become familiarized.

This will secure uniformity of practice and the advantage of commentary on the rules prescribed by the English decisions."—*See the Report of the Special Committee*

C P C (1908) O 11 r 1=(1882, S. 121) -Concld.

See cases under:—

(1) Interrogatories.
(2) Practice—Civil Cases—Interrogatories.

C P C O 11 r 1—Omission to make a puisne mortgagee party to a suit—Registration-Notice-Transfer of Property Act 1882 ss. 3, 85.
See C P C O 34.

C P C O 11 r 2

Notes—This rule is new it follows English O. 31 r. 2

C P C O 11 r 3=(1882) S. 123

Notes:—This rule corresponds to section 123 of the C P Code 1882, with some additions and alterations and it follows the English O. 31 r. [illegible]

C P C O 11 r 4

Notes:—This rule is new; it follows English Or. 31 r. 4.

C P C O 11 r 5=(1882) S. 124

Notes:—This rule corresponds to s. 124 of the C P Code, 1882, with some change in the language. It follows English Or XXXI, r 5.

C P C O 11 r 6=(1882) S. 125.

Notes:—This rule corresponds to s. 125 of the C P Code, 1882, with some additions and alterations. It follows English Or. XXXI, r. 6

C P C O 11 r 8=1882 s 126.

Notes—This rule corresponds to s. 126 of the C P Code, 1882, with this modification that the words "*from the service thereof*" which occurred after the words "ten days" in the old Code have been omitted. It follows English O. XXXI r. 8.

C P C O 11 r 11=(1882) s 127.

Notes.—This rule corresponds to section 127 of the C P Code, 1882, with some alterations and

C P C (1908) O 11 r 11=(1882, S. 127) -*Concld.*

omissions. The proviso attached to the old section has been omitted. It follows English Or XXXI, r 11.

C P C O 11 r 12=(1882, s 129)

Notes.—This rule corresponds to section 129 of the C P Code of 1882, with much elaboration, and it follows English Or XXXI. r 12.

See Cases under:—

(1) Inspection of Documents
(2) Practice—Civil Cases—Inspection and Production of Documents.
(3) Appeal exparte Cases Case No. (679) **7 All 159.**
(4) Contempt of Court
(5) Interrogatories.

—O 11 r 12 (=1882, s:129=1877, s 129).

Order for discovery when allowed and disallowed—See **12 C L J 505=8 Ind Cas 107.**

—O 11 r 12
See C P C O 7 r 14 Case No 1679.
11 P R 1902

C P C O 11, r 13

1990—C P C O XI rr 13, 18 (2)—Filing of affidavit of documents by one party—Subsequent application by other party for discovery and inspection—Not precluded.

The filing of an affidavit of documents under O XI, r 13, Civ Pro Code, 1908, by one party, does not preclude the other party from making a subsequent application for discovery and inspection under O XI r 18 (2). **Basanta Kumar Goswami v Kumudini Dasee.** **38 Cal 428.**

—O 11 r 13
See C P C O,7 r 14 Case No 1679
11 P R 1902.

C P C O 11 r 14-(1882) S 130.

Notes.—This rule corresponds to section 130 with some additions and alterations. It follows English or 31 r 14.

C P C (1908) O 11 r 14-(1882) s 130.

See Cases under:—

(1) Inspection of documents

C P C (1908) O 11 r 14=(1882, S. 130) -*Concld.*

(2) Practice—Civil Cases— Inspection and production of documents.

C P C (1908) O 11, r 14 and O 11 r 21= 1882 Ss 130, 136

See (1) Written statements **59 P R 1892.**

(2) Evidence Act 1872, s 130.

1991.—C P C O 11 r 14—(1882) s 130).—

Discovery—Materiality of evidence s 130, Civil Procedure Code—Court calling for document for its own inspection.—Where discovery and inspection is sought of Certain documents and their materiality is denied by the other side, the Court ordered under S 130 of the Civil Procedure Code the production of the documents for the purpose of inspection by itself. **Gurmuk Roy v Tularam.** **[illegible] Cal 424=5 C W N 153= 11 M L J 65=28 I A 28 P C.**

1992—C P C O 11 r 14 (1882 Sec 130).—Production of documents by order of Court—Whether opposite party entitled to inspection—Discretion in revision.

Where documents are produced by one party in obedience to an order of the Court made under Sec 130, of the Civil Procedure Code.

Held that the High Court should not interfere in revision with direction exercised by that Court in premitting or refusing inspection of the said documents by the opposite party.

But the discretion should be exercised on certain principles, where documents have been filed as relating to matters in issue in the suit, the opposite party should be allowed to inspect and take copies of them unless they are privileged in law, relate *exclusively* to the case of the party producing them, and contain nothing supporting or tending to support his opponent's case. 9 Mad 257, 18 Bom 35, Fol: **P Balamony v. Ramasawmy Chettiar** **2 M L T 88= 17 M L J 79=30 Mad 230.**

C P C O 11 r 15-(1882) s 131

Notes.—This rule corresponds to section 131 of the C P Code, 1882 with several additions and alterations. It follows the English Or XXXI, r 15.

C P C (1908) O 11 r 15=S. 131 (1882)

-Concld

See Cases under:—

(1) Inspection of documents
(2) Practice—Civil Cases—Inspection & production of documents.

C P C O XI r 15—Inspection of documents, jurisdiction of a Judge to give—**See**—Letters Patent, High Court, 1865—Bombay cl 15,

C P P O 11 r 16-

Notes.—This rule is new and it follows the English O 30 r 16.

C P C O 11 r 17 (1908)=s 132 (1882)

See Cases under:—

(1) Inspection of documents
(2) Practice—Civil Cases— Inspection and production of documents.

C P C O 11 r 18 (1) of (1908)=s. 133 1882)

See Cases under:—

(1) Inspection of documents
(2) Practice—Civil Cases—Inspection and production of documents.

—O 11 r 18.

See C P C O 11 r 13 Case No 1990 **38 Cal 428.**

C P C O 11 r 18 (2)=(1882) s 134

Notes.—Sub-rule (1) of this rule corresponds to sec. 133 and sub-rule (2) corresponds to section 134 of the C P Code 1882, with several additions and alterations; and it follows English Or XXXI, r 18.

C P C O 11 r 18 (2) Of (1908)=S 134 (1882)

See Cases under:—

(1) Inspection of documents
(2) Practice — Civil Case — Inspection and production of documents.

C P C O 11 r 20=(1882) s 135

Notes.—This rule corresponds with section 135 of the C P Code, 1882 with some verbal changes only. It follows English Or XXXI, r 20.

C P C (1908) O 11 r 20=S 135 (1882)

-Concld

See Case under:—

(1) Inspection of documents
(2) Practice—Civil Cases— Inspection and production of documents

C P C O 11 r 21=(1882) s 136.

Notes.—This rule corresponds to paras. 1 and 2, of section 136 of the C P Code of 1882, with some alterations and omissions. The word *defended*, has been substituted for the word "answered" Para. 3 of the old section, relating to criminal prosecution for non-compliance with the order, has been omitted. It is based upon English Or XXXI r 21.

C P C O 11 r 21 (1908)=s 136 (1882)

See Cases under:—

(1) Inspection of documents
(2) Practice—Civil Cases —Inspection and production of documents.
(3) Appeal—Exparte Cases. Case No (579) **7 All 159.**
(4) Contempt of Court
(5) Interrogatories.

1993.—C P C O XI r 21—Penal Code Ss 175 and 188—Difference between s 136 of the old, and Order XI, Rule 21.

Held, that a party to a suit failing to comply with an order for production or inspection of documents can be dealt with only in the manner prescribed by Order XI, Rule 21, and is not punishable under the P C. **Ram Chand 15 P W R 1910 (Cr)=5 Ind Cas 842.**

1994.—C P C O 11 r 21=(1882 s 136)—Scope of— Discretion—Defence when to be struck off.

S 136 of the Code of Civil Procedure is based upon Order 31, Rule 21 of the Supreme Courts in England. It renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever.

If there is contumacy or obstinacy on the part of the defendants or a wilful attempt, to disregard the order of the Court, an order under s 136 of the Civil Procedure Code is appropriate. W. N, (Eng) 201; W N (Eng) 329 W N (Eng) 193; 34 L T 752: 5 Cal 707=5 C L R 509; 9 Cal 923 Ref **Banshi Singh v Palit Singh.** **7 C L J 295.**

1995.—C P C O II r 21 (=Civ Pro Code 1882, s 136)—Procedure—Circumstances under which s 136 should be applied—Under delay of plaintiff in moving Court.

The provisions of s 136 of the Code of Civil Procedure ought not to be put in force except in in extreme cases. Where the defendant had not complied with an order for discovery within the time limited by the Court's order in that behalf, but had subsequently been permitted to file a written statement and to produce documents which he relied on in support of his defence, which documents remained upon the record of the case for some six months before the plaintiffs applied under s 136;and where, further, it appeared that the plaintiffs had been in no way prejudiced by the non-compliance of the defendant with the orders of the Court, held that the Court had not properly exercised its discretion in applying s 136 and striking out the defendant's defence. (5 Cal 707 Ref:) **Sobha Ram v Sardar Singh** **A W N 1897, 140.**

1996.—C P C O II r 21=S 136—Exercise of powers given by section.—

The powers given to the Court by s 136 of Act X of 1877 should not be exercised except in extreme cases. **Sham Kishore Mundle v Shoshi Bhoosan Biswas.** **5 Calc 707: 5 C L R 509.**

Notes:—Ref: 7 C L J 295.

1997—C P C O 11 r 21—(1882 s. 136).

The plaintiff and his witness were present on the date fixed but the case was taken up, and the witness was directed to attend on the next hearing. On the adjourned hearing the plaintiff appeared but the witness did not appear. Held that the suit should not be dismissed, although fresh summons was not issued to the witnesses. 24 Mad 200 referred to. **The Collector of Jaunpur v Kabuli Rai.** **A W N (1905) 92=2 A L J 345.**

1998—C P C O XI r 21=s. 136 of 1882.

Held that a Court has no power to strike out the defence of a defendant of *its own motion* under s. 21 of Order XI of the C P C. 80 P R 1889; 59 P R 1892, Fol. **Lala Das v A Spratt.** **84 P L R 1910=8 Ind Cas 245.**

1999—C P C O 11, r 21=s. 136—Minor.

In a suit in which the principal defendant was a minor under the guardianship of his stepmother,the plaintiff applied for the production by the minor of certain account books which had belonged to the minor's deceased uncle. On this application the Court issued a summons under s. 136 of the Code of Civil Procedure to the minor to appear and produce the books. Some were produced, and it was stated on behalf of the minor that if there were others and they could be found they also would be produced. The remaining books, if there were any, were not produced, and it was stated on behalf of the minor that they could not be traced. Ultimately, on the motion of the plaintiff, the Court took action under s. 136 of the Code and struck out the minor's defence to the suit. On the same day that the plaintiff applied to the Court to take action under s. 136, the minor himself appeared and made an application stating that his guardian was colluding with the plaintiff, and asking for the appointment of another guardian, also asking the Court to appoint a guardian *ad litem*. *Held* that under the above circumstances the Court was wrong in exercising the powers given by s. 136 of the Code. **Kamta Prasad v Kamta Nath,** **16 W N 156.**

2000—C P C O 11 r 21—Ss. 136, 138, 139 —Failure to comply with or directing defendant to produce documents by specified date—Defence struck out and case heard exparte.

Plaintiff's plaint was filed in the District Court on the 23rd December 1895, and the 9th February 1896 was fixed for defendant's appearance. The latter appealed on the said date, but the case was put off to the 24th February, on which date defendant filed his defence. After several adjournments, issues were drawn and the parties examined on the 2nd April, and at close of the day's proceedings the District Judge recorded an order to the following effect: "Case for evidence on the 19th and 26th May. Defendant must file the documents he has in his possession and copy of his account-book by 5th April." On all the adjourned dates, except one defendant was present in person in Court.

C P C (1908) O II r 21=(1882, S. 136) -*Contd.*

On the 2nd April plaintiff had a notice served on defendants for the production of his books and certain letters, and on the 9th April defendant gave plaintiff notice under Section 133 of the Civil Procedure Code, offering inspection at a certain place on the 19th. On the 21st April, after inspection by the plaintiff, defendant applied for leave to remove his books to his shop, and on the followidg day the District Judge gave the required permission. Plaintiff called defendant as his witness for the 19th May, but the notice was returned unserved with the endorsement that defendant had gone away. Thereupon plaintff's pleader complained that defendant had kept out of the way to evade service, and had not complied with the order of the 2nd April. The Court was, therefore, asked to proceed under Section 136 of the Code, by striking out defendant's defence, and to decide the case *ex parte*. The Court held that the said order was one under Section 130 of the Code, struk out the defence under Section 136, and after taking some evidence for the plaintiff, decreed the claim in full. The decree having been upheld by the Divisional Court on appeal, defendant appealed to the Chief Court.

Held, that the lower Courts had erred in treating the order of the 2nd April as one passed under Section 130 of the Code, and that the District Court was not justified by defendant's non compliance with the said order in striking out the defence and deciding the case *ex parte*.

Section 130 of the Code does not apply to a general direction, without any particular object in view, to a party to produce all documents in his possession by a certain date, and (*semble*) the order therein referred to is meant to be served on the party to whom it is given and not merely to be verbally announced, so that compliance would depend on his memory or his understanding of it.

Held, further, that even if the order in question had been one under Section 130, it could not be legally given in respect of the copy of defendant's accounts as they were not in existence, and therefore not in the possession or power of defendant, when it was passed.

Section 136 of the Code requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one, and to grant a little further time for compliance. **Jaisukh v Dina Nath.**

58 P R 1898.

2001—C P C O. 11 r 21=(S. 136 Civ Pro Code 1882)—Order under—Appeal.

As an order under S. 136 C P C 1882 dismissing a suit comes within the meaning of a "decree" an appeal lies from it. **Khushali Mal v Pala Mal.**

43 P R 1898.

Notes:—Ref: 131 P R 1907=51 P W R 1907.

2002—O P C O 11 r 21 (=old s 136 C P C 1882)—Inspection of documents—Non compliance with order for—Power of Appellate Court.

If the Court of the first instance has not punished the plaintiff for his contumacy under s. 130, the Court of appeal has no power to punish the plaintiff by way of dismissing the suit on that ground. **Amir Chand v Tirkah.**

36 P R 1900,

2003—C P C O 11 r. 21.

Power of Registrar (original side) to dismiss suit under, for want of prosecution. Rules of High Courts and Supreme Courts, Calcutta.

6 C L J 874.

—O 11. r 21 ; O 16, r 20—Defendant examined as plaintiff's witness—Adjourned hearing—Undertaking to appear on—Failure—Defence struck out—Illegality. **See 10 M L T 451.**

—O 11 r 21=1882 s. 136 See Practice—Civil Cases—Interrogatories. **8 O C 172.**

—O 11 r 21-See C P C O 5 r 3.Case No 1605.

A W N 1896, 143.

C P C O 11 r 22

Notes:—This rule is new and it follows English O 31 r 24.

2004—C P C O II r 22 Cl 15—'Judgment'—C P C S. 135—Order under—Appealability of.

An order under S. 135 of the Civil Procedure Code is not a 'judgment' within the meaning of Cl. 15 of the Letters Patent, and hence no appeal lies from such an order. **Secretary of State v Jehangir.**

4 Bom L R 349.

C P C O 11 r 23.

Notes—This rule is new and it follows the

C P C (1908) O 11 r 23-*Contd.*

case of 19 Bom 350 and of 10 Bom 167, where it has been held that an affidavit of documents may be required from a minor defendant; and it overrides the case of 22 Cal 891, where it was held that an infant party cannot be compelled to give discovery by affidavit and inspection of documents in his possession ; and that the penalties prescribed by rule 21 (s. 136 of Act XIV, 1882) are obviously inapplicable to infants and persons under disability.

C P C O 12 r 1.

Notes—This rule is new and it has been borrowed from English Or 32, r 1.

"The committee think the practice of admissions may with advantage be extended to facts [illegible] well as to documents. The procedure is not compulsory, but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by Courts."—*See the Report of Special Committee.*

C P C O 12 r 2=(1882) S. 128.

Notes.—This rule corresponds to section 128 of the C P Code, 1882 with several alterations and additions and it has been borrowed from English Or XXXII, r 2.

C P C O 12 r 3.

Notes:—This rule is new and it has been borrowed from English O 32 r 3.

C P C O 12 r 5.

Notes.-This rule is new and it has been borrowed from English O 32 r 5.

C P C O 12 r 6.

Notes.—This rule is new and it has been borrowed from English or 32 r 6.

C P C O 12 r 7.

Notes:—This rule is new and it has been borrowed from English or 32 r 7.

C P C O 12 r 8

Notes.--This rule is new and it has been borrowed from English or 32 r 8.

C P C O 13 r 1 (1)=(1882) s. 138=(1859) s. 128.

Notes.--Sub-rule (1) corresponds to section 138 of the C P Code, 1882, with some material changes. The words, " *shall produce* " have been sustituted for the words, "*shall bring with them, and have in readiness at the first hearing of the suit to be produced when called for by the Court*" which occurred in the old section. The change is material, [illegible] under the present rule the parties shall have to produce all documentary evidence in their possession and power at the first hearing of the suit; but under the old section, the parties were simply required to bring with them and to have in readiness all their documents, which they had to produce only when *called for by the Court.*

Clause (2) of this rule corresponds with the first para of s. 140 with some alterations which are not material.

—O 13 r 1—See C P C O 11 r 21 Case No 2000. **[illegible] P R 1898.**

2005.—C P C O 13 r 1 (1)=S. 138 (1882).

The main object of s. 128 was to prevent parties from manufacturing evidence pending the trial, to meet unexpected exigencies, and not to shut out true, good, and valuable evidence, merely because the party had, without good and assignable cause, abstained from bringing [illegible] before the Court at the first hearing. **Ikram Hossein v Ram Lochun Dutt. 23 W R 29.**

Notes:—Fol 22 Bom 173, 12 C W N 318=8 C L J 147; Ref 6 C L 621.

2006.—C P C O 13 r 1 (1)=(1882 s. 138) scope of.

Section 138 of the Code was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion, such [illegible] certified copies of public documents like records of Government or judicial proceedings. **Lilabati Misrain v Bishun Chobey. 6 C L J 621.**

2008.—C P C O 13 r 1 (1)=S. 138 Production of documents.

S. 138 of the Civil Procedure Code was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government. 23 W R 29 followed. **Ranchhod Hirabhai v. Sereetary of State For India.**

P J 1896, 217=22 Bom 173.

Notes:—Ref 6 C L J 621 Fol: 12 C W N 312 =8 C L J 147.

2009.—C P C O 13 r 1 (1)=1882. ss. 138 and 139 (1859 s. 128)—Documentary evidence.—

Parties are required to have with them in Court, at the first hearing of the suit, all their documentary evidence, but need not file it then unless it is called for. **Mahbub Hossein v. Patasu Kumari.** **1 B L R A C 120; 10 W R 179.**

2010.—C P C O 13 r 1 (1)=S. 138 Documentary evidence production of.—

A party is bound under Act VIII of 1859, s. 128 to be prepared at all points with his documentary evidence, and as soon as the Court has framed the issues which it thinks proper to lay down, at once to tender (if called upon) the documentary evidence bearing thereon. The words " first hearing in the suit " are defined by s. 139 and do not mean the first hearing on the issue. **Gour Huree Chowdhry v Pran Huree Laha.** **21 W R 42.**

2011.—C P C O 13, r 1 (1)=S. 138 (1882) S. 128 (1859)—Filing documents with plaint—Translation of document.

By s. 128 of Act VIII of 1859 it was not necessary to file with the plaint all the documents that the plaintiff intended to give in evidence. A document which is to be given in evidence need not be translated previous to the hearing of the case. **Kameenee Dossee v Hurromoney Dossee.** **Bourke, O C 91; Cor 151.**

2012.-C P C O 13 rr 1 (1) 2, S, 100=(1882 ss. 138, 139, 584)-Documents when to be filed-Second appeal—Erroneous exercise of discretion—Civil Procedure Code Sec. 584.

It is not obligatory on the plaintiffs, unless they are called upon to do so, to produce documents which are not such as ought to have been produced in Court when the plaint was presented.

It is for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier were not [illegible] produced for good and sufficient reasons.

Section 138 of the Code of Civil Procedure was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings.

When a suborbinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has power to interfere under section 584 of the Civil Procedure Code. (1 B L R 120, [illegible] W R 42 Fol) **Talewar Sing v Bhagwan Dass. 8 C L J 147. 12 C W N 312.**

Notes:—10 C L J 33=13 C W N 797.

2013.—C P C O 13 r 1 (1) S. 138 Documents produced but not filed.

This section applies to documents which have been produced at the filing of the plaint, but not filed and in this way is not incompatible with s. 39. **Premsookh Chunder v Balkisto Mitter.** **1 Hyde 145.**

2014.—C P C O 13 r 1 (1) S. 138—Exhibits.

Documents produced in Court under s. 128 Act VIII of 1859 become, upon and by reason of their production, exhibits in the case. **Raojee Gunesh v Rao Jalee Pershad.** **[illegible] W R 91.**

2015.—C P C O 13 r 1 (1)=S. 138 Documents not filed with record owing to mistake of Court's officers.—

A Civil Court is bound to receive [illegible] evidence authenticated documents named in the plaint, and filed by the plaintiff's pleader on the day appointed for fixing issues, even though, through inadvertence of the amlah they were not made part of the record. **Ram Runjun Chuckerbutty v Anund Coomar Mookerjee.**

15 W R 323.

C P C (1908) O 13 r 1=(1882, S. 138) -Contd.

2016.—C P C O 13 r 1 (1)=S. 138–Right to adduce fresh documentary evidence after issues settled-Ground for rejecting or admitting.

Under s. 138 Act VIII of 1859 the parties, though not entitled as of right to adduce fresh documentary evidence after the issues in the case are settled, may yet tender such evidence stating the grounds upon which it was not tendered at an earlier stage; and the Judge may receive or reject such evidence but the grounds on which he acts should be stated on the record. **Watson & Co v Kunhya Bahadoor.** **[illegible] W R 294.**

2017.—C P C O 13 rr 1 (2), 3 and 6=(Civ Pro Code 1882 ss. 140, 142–Stamp Act II of 1899 Ss. 35, 36–Insufficiently stamped document admitted in evidence-Objection [illegible] to its admissibility.

Where an insufficiently stamped document was not rejected under s. 142 of the Code but was marked as [illegible] exhibit under s. 140 having regard to the language of s. 36 of the Stamp Act no objection could be raised as to its admissibility at any later stage of the suit on the ground that the provisions of s. 35 of the act as to the levy of penalty had not been complied with. **Sugappa v Govindappa.** **12 M L J 351.**

2018.—C P C O 13 rr 1 (2), 3=S. 140–Admission and rejection of documents.

At the stage of a suit referred to in Act VIII of 1859 ss. 128, 129 and 132 the Court ought to sort the documents tendered into two classes those relevant and admissible and those irrelevant and inadmissible and to reject *in limine* all documents which are evidently such as cannot be used as evidence in the suit. The admission of a document at this stage does not imply that it is evidence, but merely declares that it may if properly treated be used [illegible] evidence in the suit and filing it as a part of the record does not confer any authority on such document or operate to dispense with any proof of genuineness. Courts of first instance ought to specify what portions of the documentary evidence [illegible] the record they have accepted, and what portions they have refused to listen to. All the proceedings of the parties in respect of the use of documentary evidence are matters to be recorded [illegible] the proceedings of the Court by the Judge's own note. **Tumeezoddy v. Busarut,** **21 W R 76.**

Notes:—Fol: 23 W R 428.

C P C (1908) O 13 r 1=(1882, S. 138) -Concld.

2019—C P C—O. 13 rr. 1 (2), 3=S. 140—Reception on record of irrelevant and inadmissible documents.

Attention drawn to the neglected provision of the Code of Civil Procedure, 1859 (s.129), which prohibits Courts from receiving on the record of [illegible] case, without restriction and without discrimination, documents which are either irrelevant or inadmissible. **Issur Chunder Ghose v. Russeek Lal Mundul,** **11 W R 576.**

—O 13 rr 1; 2=S 140 (1859 S. 129).

See Superintendence of High Court—Charter Act s 15. **18 W R 511**

2020.—C P C O 13 rr 1 (2), 3=1882 S 140-Opportunity for Court to inspect evidence.—

A Court cannot be said to have received documents as admissible in evidence when, for want of time to inspect and consider them, it orders them to be filed; nor would it be wrong in law in rejecting or returning them after proper inspection; the object of s. 129, Act VIII of 1859, being that papers should be produced in a regular manner, and inspected by a Court at its convenience. **Soodukhina Chowdhry v. Raj Mohun Bose,** **11 W R 350.**

C P C O 13 r 2=(1882) S. 139.

Notes—This rule corresponds to section 139 of the C P Code 1882, with some verbal changes only.

—O 13 r 2—See C P C O 13 r 1 Case No. 2012 **8 C L J 147**

—O 13 r 2—See C P C O 11 r 21 Case No. 2000 **58 P R 1898**

C P C O 13 r 3=(1882) S. 140.

Notes—This rule corresponds exactly with sec. 140 para 2 of the old Code

—O 13 r 3—See C P C O 13 r 1 Case No. 2017 **12 M L J 351.**

C P C O 13 r 4=(1882) S. 141=(1859) S. 132.

Notes—This rule is almost similar to section 141 of the C P Code, 1882 with this modification only, that the words, "or *initialled*" have been added after the word "signed." The word "*initialled*"

C P C (1908) O 13 r 4=(1882, S. 141)
-*Concld.*

has been added to save the time of the judicial officers, [illegible] a good deal of time was required in signing the endorsements.

C P C O 13, r 4—See Evidence

A W N 1888, 22.

2021-C P O 13 r 4=1882 s. 141 (1859.s 132) — Production of documents—Endorsement.

Exhibits produced in Court ought to be endorsed with the name of the person who produces them as required by s. 132 of Act VIII of 1859. **Bisram Singh alias Bishen Singh v Indurjeet Koonwar.** **6 W R 1.**

2022—C P C O 13, r 4—C P Code framing of additional issues.

Held in contravention of the various ruling of the late Sudder Court, that a suit brought on alleged settlement of accounts, and balance struck and admitted, should not be dismissed merely on account of the plaintiff's failing to prove the alleged settlement and admission of balance by defendant; but that the Court, being competent under section 141 of the Code of Civil Procedure to amend or frame additional issues that may be necessary to determine the real question or controversy between the parties, ought to enter into evidence regarding the items composing the account, and decree the claim regarding such items, if they are found to be due and not otherwise barred. **Kishen Pershad v Bhawanee Deen.**

Agra Rep F B. 47.

2023 C P C O 13, r 4=S. 141.

Where a witness has proved a document *i.e.*, has deposed to its execution, the party wishing to use it as evidence should tender it for that purpose and its admission or rejection should be forthwith noted on the document and in the *rozenama* or diary of the proceedings. **Ramchandra v Naro**

1887 P J 107.

C P C O 13 r 5=(1882) S. 141A

Notes—This rule corresponds to section 141A of the C P Code, 1882, with some additions and alterations. The material changes introduced are (1) the addition of the words "*save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891;*" and (2) "*entry in a letter-book.*" The other changes are not important.

2024. C P C O 13, rr 5 and 7 (= ss. 141-A, 142-A Civ Pro Code, 1882).

C P C (1908) O 13 r 5=(1882, S.141A)
-*Concld.*

A copy or an extract from an entry in an account book, filed under the provisions of ss. 141-A 142-A of the Civ Pro Code, 1882, does not require to be stamped under art 24 of sch. I of the Stamp Act, 1899. **Kastur v Fakiria.**

4 Bom L R 223=26 Bom 522

Notes --Ref 27 Bom 150.

C P C O 13 r 6=(1882) S. 142.

Notes—This rule is almost similar to section 142 of the C P Code, with the additions of the words "or *initialled*" after the word "signed." The other changes are mere verbal.

—O 13 r 6—See C P C O 13 r 1. Case No 2017.

12 M L J 351.

C P C O 13 r 7=(1882) S. 142A,

See Appellate Court--Evidence and Additional Evidence on Appeal. Case No (184).

14 All 356.

—O 13 r 7-See C P C O 13 r 5. Case No 2024

26 Bom 522.

C P C O 13 r 8=(1882) S. 142A.

Notes—This rule corresponds exactly with section 142A of the C P Code 1882.

C P C O 13 r 9=(1882) S. 144.

Notes—This rule corresponds to section 144 of the C P Code, 1882. No change has been made in the meaning, but some of the sentences of the old section have been transposed by putting them in different orders, as will appear on comparison. The words "*in a receipt book kept for that purpose,*" which occurred in the last para, of the old section, have been omitted. The words "*the Court being satisfied that*" and the words "*and that no appeal has been preferred*" have been added to clause (b). The words "*earlier than that prescribed by this rule,*" have been substituted for the words "before either of such events" in the first proviso; and the words, "*undertakes to produce the original if required to do so*" have been added in the said proviso.

The word "*wholly*" has been added before the word "void" in the second proviso.

C P C (1908) O 13 r 9=(1882) s. 144)

–Concld

2025—C P C O 13. r 9=s. 144.

Where a suit was filed on a khata and the Court thought that no suit would lie on it as it was merely a renewal of another khata and thereupon the plaintiff asked leave to amend his plaint so as to make the earlier khata the cause of action and produced it and on that leave being refused asked leave to withdraw the suit with permission to bring a fresh one and on the plaintiff applying for a return of the book containing the earlier khata the Court refused to give it holding that the plaintiff had by suing on latter khata cancelled the earlier one. *Held* that the plaintiff was entitled to a return of his document.

Vaman v Ganesh. **1893 P J 123.**

C P C O 13 r 10 (1)=(1882) S. 137=(1859) s. 138.

Notes—This section is almost similar to section 137 of the C P Code, 1882. The only change introduced in this rule, is the substitution of the words "*of its own motion,*" for the words "of its own accord" which occurred in the old section.

Court's discretion to send for persons.

2026—C P C O 13 r 10 (1)=S. 137—Objection of Judge to send for record in another case.

A Judge was not bound, under s. 138, Act VIII of 1859, upon the application of any of the parties to a suit, to send for the record of any other suit.

Heeramun Roy v Tahoour Enam. **7 W R 109.**

Corash v Gooroo Churn Ghose. **18 W R 13,**

2027—C P C O 13, r 10(1)=(1882) S. 137—Decision on document sent for from record of another case.—

A Judge may send for and inspect any document, filed with any record in his Court, and there is nothing in the Code of Procedure to prevent his basing his decision, wholly or mainly, on such document. **Bunwaree Lall v. Kisto Behary Roy.** **1 W R 63.**

2028—C P C O 13, r 10 (1)=(C P C 1859, S 138)—Record of a Criminal Case—Inspection in a Civil suit.—

In a Civil suit, the record of a criminal case or any other case may be inspected under S. 138, Civ Pro Code. **Fakiruddin v. Mussammat Hossein Bibi,** **32 P R 1874.**

C P C (1908) O 13 r 10=(1882, S. 137)

–Contd.

2029—C P C O 13 r 10(1)=S. 137—Sending records sent for by another Court—Discretion of Court.

A Court had no discretion to refuse to send records which had been sent for by another Civil Court under s 138 of Act VIII of 1859.

Gopal Coomary Dassee v Soonder Narain Deo. **4 C L R 36.**

2030.—O 13 r 10(1)=S 137.

Papers specially mentioned—Production of record.

Under s 138, a Court was not bound to send for the whole record but only for such papers as might be specially mentioned in the application.

Janokee Beebee v Habeebul Hossein **W R 1864. 272.**

2031-C P C O 13 r 10(1)=S 137– Public record —Cazee's books.

A cazee's book is not strictly an official record. Before a document could be inspected under the provisions of s 138, Code of Civil Procedure, which applied to appellate as well as Original Courts, the Court was bound to see whether it came under the description of a public record.

Juggernath Sahoo v Mahomed Hossein. **15 W R 173.**

Application of a party for record.

2032.—C P C O 13 r 10 (2)=1882.–S 137 (1859 sec 138)— Application for production of documents in another case—Discretion of Court.–Per Norman C. J.—

When a proper application was made to a Judge under s 138, Act VIII of 1859, to send for, from the records of his own Court, papers which would be evidence in the case before the Court, the Judge had no discretion in the matter, but the section must be treated as giving a power which the Judge was bound to exercise,—the principle being that where a statute conferred an authority to do a judicial act in a certain case, it was imperative on those authorized to exercise the authority when the case arose. Per Kemp, J.—It was in the discretion of the Court to send

C P C (1908) O 13 r 10=(1882, S.137)

–Contd

for them or not. Per Steer, J.—Though the Judge was not bound to send for them, it would be unfair not to do so. **Rughoonath Bose v Oomed Ali.** **W R F B 177.**

2033.—C P C O 13 r 10 (2)=S 137-Records from Court of Wards,

Where records from a Government office are required as evidence, it is for the Court to send for them ; but papers required from a Court of Wards, which is not a Government office, must be obtained by the party who needs them, by means of a summons on the proper officer.

Sobbee Jha v Shosheenauth Jha.
15 W R 150.

No power to use in admissible documents.

2034.—C P C O 13 r 10 (3) =S. 137—Admissibility of documents from record of another case.—

Held, that a Civil Court which inspects the records of another case under sec 138 of Act VIII of 1859 can only use as evidence such documents as are otherwise unobjectionable and admissible for or against either of the parties to the suit. **Narappa Bin Appa Hegdi v Gapaya Bin Kapaya.** **2 Bom H C R 361= 2nd Ed 341.**

2035.—C P C O 13 r 10=S 137– Omission to summon Registrar.

In a suit on a registered bond in which defendant asked the Court to send for the registration books, with a view to prove the non-existence of the bond at the time it purported to be certified, *Held* that, as defendant had failed to summon the Deputy Registrar, it was not necessary for the Judge to sue the discretion given in sec 138, Act VIII of 1859. **Monmohinee Debee v Sreedhama Churn Ranna.** **14 W R 302.**

2036.—C P C O. 13 r. 10.=C P C S 137.

The provisions of sec 137 of the Code of Civil Procedure must be strictly complied with : and the High Court will not in second appeal send for the record of a previous suit merely because such record has been sent for and inspected by the lower Courts, where no such application, as is provided for by section 137, has been made to it. **Hira Singh v Ram Lal** **14 W N 3.**

C P C (1908) O 13 r 10=(1882 S. 137)

Concld.

C P C O 14 r 1=((1882) S. 146=(1898) S. 139.

Notes:—This rule corresponds to section 146 of the C P C Code, 1882. with some additions and alterations. The words " *or a defendant must allege in order to constitute his defence*" have been added to sub-rule (2) ; and para 6 of section 146 of the old Code has been relegated to rule 3.

C P C O 14 rr 1, 2=(1882 Ss. 146, 153 (1859) Ss. 132, 144.)

See Cases under:—Issues.

2037.—C P C—O 14 r 1, 2—O 6 r 14, 15 ; (1882 Secs. 146 and 115)—Written statement, received and not objected to, though not signed or verified according to law—Objection taken on appeal after case fought out on merits—Appellate Court, if should give effect to objection.

It is not obligatory upon a defendant to put in a written statement. He may do so if he likes. Sec 146 of the Civil Procedure Code contemplates that issues may be settled, whether there was a written statement or not, though it is not obligatory on the Court to frame issues, if the defendant makes no defence.

Where a written statement filed on behalf of the defendant was actually received by the Court and no application was made by the plaintiff to have it taken off the file on the ground of its not being signed and verified by the defendant as required by S. 115 of the Civ. Pro. Code, and the question was raised for the first time in appeal, after the Case had been fought out in the first Court on the footing of a proper written statement.

Held that, in such circumstances, the appellate Court was not justified in decreeing the suit on the footing that there was no defence, by reason of the written statement not being

C P C (1908) O 14 r 1=(1882, S. 146) -*Concld.*

signed or verified by the defendant, and the Case should have been tried on the merits. **Rustun Gazi v Tara Prosanna Chowdhuri** **11 C W N 871.**

C P C O 14 r 2=(1882) S. 146 para 6.

Notes—This rule corresponds to para 6 of s. 146 of the C P Code, 1882, with this modification that the word "*where*" has been substituted for the word "when" which occurred in the beginning of the old section and the words "*or any part thereof*" have been added after the word "case".

—O 14 r 2—See C P C O 14 r 1 Case No. 2037. **11 C W N 871.**

C P C O 14 r. 3=(1882) S. 147.

Notes:—This rule corresponds with section 147 of the C P Code, 1882, with this alteration only that the word "*pleadings*" has been substituted for the words "*in the plaint or in the written statements* (*if any*), *tendered in the suit*" which occurred in cl (*b*) of the old section.

C P C O 14 r. 4=(1882) S. 148.

Notes:—This section corresponds to section 148 of the C P Code, 1882, with some additions and alterations. The word "*where*" has been substituted for the word " if " in the beginning: the words "*(subject to any law for the time being in force)*" have been substituted for the words "(subject to the rules contained in the Indian Evidence Act);', and the words "*possession and power*" have been substituted for the words "in whose hand it may" which occurred in the old section.

C P C O 14 r 5=(1882) S. 149.

Notes—This rule corresponds to section 149 of the C P Code, 1882, with this alteration only that the words "*matters in controversy*" have been substituted for the words "controversy between the parties" which occurred in the old section.

—O 14 r 5—See C P C O 6 r 17 Case No 1687. [illegible] **Ind Cas 267.**

C P C (1908) O 14 r 6=(1882) S.150.

Notes.—This rule corresponds to section 150 of the C P Code, 1882. The only change made is the substitution of the word "*where*" for "when" and one sentence of the first para of the old section has been attached to cl. (a).

2038—C P C O 14 r 6=(1882) S 150.

Civil Procedure Code (Act XIV of 1882) Ss. 150, 151—Agreement of parties to refer to commissioner—Appeal. Where the parties agreed to refer certain issues of fact to a Commissioner and to abide by his decision, they impliedly agree not to appeal against the decree passed in accordance with commissioner's report and hence they are estopped from impugning that decree, and the order of remand passed on appeal therefrom and the subsequent proceedings in pursuance thereof are all null and void. (8 Cal, 445) referred to.

The principles laid down in ss. 150 and 151, C. P C are applicable in this case. **Bahe Das Chakravarti v Nobin Chandra Pal** **6 C W N 121=29 Cal 306.**

2039—C P C O 14 rr 6, 7 s. 96 (=ss. 150, 151, 540 Civ. Pro. Code, 1882)—Appeal.

A decree passed under the terms of ss. 150, 151 Civ Pro Code is appealable. In an ordinary suit the duty of settling the issues between the parties for trial is placed upon the Court under s. 146 Civ Pro Code. Ss. 150 and 151 simply enable the parties themselves, by mutual agreement to settle the issues that are to be tried, but those sections do not place the Court on a higher footing as to finality in respect to proceedings held for the trial of these issues. **Shugan Chand v Judayal Mal** **A W N 1886, 233.**

C P C O 14 r 7=(1882) S 151.

Notes—This rule corresponds with section 151 of the C P Code, 1882 with some alterations and omissions. The word "*where*" has been substituted for the word "*when*" the word "*shall*" has been substituted for the word "*may*" in paras 2 & 3 and in para. 2 the word "*decision*" has been substituted for the word "opinion" which occured in the old section.

—O 14 r 7—See C P C O 14 r 6 Case No 2039 **A W N 1886, 233.**

—O 14 r 7—See C P C O 14 r 6 Case No 2038 **29 Cal 306,**

C P C (1908) O 15 r 1=(1882) S. 152.

Notes—This rule corresponds with section 152 of the C P Code, 1882 the only change made in this rule is the substitution of the word "*where*" for "if."

2040—C P C O 15 r 2=(1882 S. 153)—

Liability joint—Joint liability of—One of the defendants admitting the claim—Consent decree against him—Plaintiff's right to carry on the suit against the other defendant—Joint liability. Where a plaintiff files a suit against both the partners jointly, but recovers judgment only against one of them on his admitting the claim, he is not thereby barred from carrying on further proceedings in the suit against the other partner. **Dick v Dhunjee.** **3 Bom L R 234=25 Bom 378.**

C P C O 15 r 3=(1882) S 154=(1859) S, 145.

Notes—This rule corresponds to section 154 C P Code, 1882. The only change made in this rule is the substitution of the word "*where*" for the words "when" and "if," and the word "*adduce*" for the word 'supply' which occurred in the old section.

2041—C P C O 15 r 3=S. 154

Power of Sitting Judge—Practice.

When the issues are framed and the plaintiff and defendant are ready and willing to proceed, the sitting Judge has power under s. 145 to proceed to the hearing and final disposal of the case. **Anonymous.** **1 Ind Jur O S 14.**

2042—C P C O 15 r 3=S. 154

Disposal of suit at first hearing.

A Judge cannot dispose of a suit at the first hearing if a party appears and objects to the adoption of that procedure. **Krisnabhupati v Ramamurti** **16 Mad 198.**

2043—C P C O 15 r 3=S. 154 (1882)=S. 145 (1859) -Adjournment of case—Necessity of further evidence.

Although a case may have been set down for final disposal, if it be a case in which further evidence is required the Judge is bound under s. 145, Act VIII of 1859, to adjourn the case unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence.

Ameer Ali v Ram Bahadoor Singh. **7 W R 84.**

2044—C P C O. 15 rr 3,4=Ss 155,154—Sufficient cause—Review.]

This was a suit in the Munsif's Court. The parties endeavoured to settle their differences by arbitration. One of the defendants told the plaintiff that he will inform the Court of what was going on. In consequence of this the plaintiff did not attend on the day fixed for the disposal of the suit nor was his pleader instructed to carry on the suit. The pleader therefore stated that the plaintiff had failed to produce his evidence. On this the Munsif dismissed the claim. The plaintiff then applied to the Munsif to review his judgment. The application was granted and the plaintiff obtained a decree. In appeal to the lower appellate Court it was held that the dismissal being under s. 155 no application for review lay; consequently the order of the Munsif admitting the application was *ultra vires*. *Held* that under s. 155 the Munsif was not entitled to dismiss the suit unless the plaintiff failed without *sufficient cause*, to produce his evidence. The defendant's saying what he did say is manifestly a *sufficient cause*. One of his remedies was to apply, for a review and therefore the Munsif's accepting it was not *ultra vires*. *Held* further that a liberal and wide interpretation should be put on the words "*for any sufficient reason*" in s. 155, Code of Civil Procedure. **Kadir Baksh v Abdur Rahman** **7 W N 105.**

2045—C P C—O. 15 r. 3=S. 154—Procedure where day is fixed for settlement of issues.

When a day is fixed for the settlement of issues in a case, the Court ought not to proceed to dispose finally of the case except with reference to the specific circumstances detailed in s. 145, Act VIII of 1859. **Jeeawan v Goolab Khan.** **1 N W., 97: Ed. 1873, 147.**

C P C (1908) O 15 r 3=(1882, S. 154) — *concld.*

2047—C P C—O. 15, r. 3=S. 154—Non-production of evidence at proper time.

The great object of the Civil Procedure Code in quiring a day to be fixed for the hearing of a case and all the evidence to be adduced on that day is that parties may thus be confronted with each other, and the whole evidence on either side be at one and the same time before the Court. Where a party fails to produce his documents at the proper time, a Court commits no error in law in refusing to send for them subsequently, if not satisfied that they are necessary for the ends of justice. **Sobbee Jha v Shosheenath Jha.**

15 W R. 150.

C P C (1908) O 15 r 4=(1882) S. 155

—O 15 r 4—Application to set aside—Dismissal for non-appearance—Maintainable or not. **See** C. P. C. O. 9 r 9. Case. No. 1793.

31 Cal 150.

—O 15 r 4—Dismissal of suit for plaintiff's non-appearance **See** C P C O 9 r [illegible] Case no 1753.

31 Cal 150.

2048—C P C—O. 15, r. 4, s. 114, O. 47, r. 1 (**=ss. 155, 623,** Civ. pro. Code, 1882)—"For any other sufficient reason"—Application for review.

The parties to a suit endeavoured to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he, the defendant, would inform the Court of what was going on, in consequence of which the plaintiff did not attend in person on the day fixed by the Munsif for disposing of the case and did not instruct his pleader as to the cause of his absence. On the case being called on, the pleader stated that the plaintiff had failed to produce his evidence and the Munsif dismissed the claim. The plaintiff applied to the Munsif for a review of judgment *Held* that, under s. 155, Civ. Pro. Code, the Munsif was not justified in dismissing the suit, unless the plaintiff failed, without sufficient cause, to produce his evidence, that there was sufficient cause, that the application for review was rightly granted, and that a liberal and wide interpretation ought to be placed upon the words in s. 623, Civ. Pro Code, "for any other sufficient reason." **Kadir Bakhsh v Abdul Rahman.**

A W N 1887. 105.

C P C O 16 r. 1=(1882) S 159=(1859 S. 149.

Notes:—This rule correspondes to section 159, C. P. Code, 1882, with some additions and alterations. The words "*at any time after the suit is instituted*" have been substituted for the sentence "*after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only or for the final disposal of the suit*" which occurred in the old Code.

C P C (1908) O 16 r 1=(1882) S. 159 (1859, S. 149).

See Cases under:—

(1) Witnesses—Civil Cases—Summoning and attendance of witnesses.

2049—C P C O 16 r 1=S.159 (Civil Procedure Code, 1859, 149.)

A party to a suit is entitled as of right under 159 to summonses to witnesses any time before the day fixed for the disposal of the suit, although the Court may, under proper circumstances, refuse to adjourn the hearing for their attendance, even though they have been summoned. **Ramchandra v Gitabai.** **1890 P J 274.**

2050—C P C O 16 r 1=(1882) S. 159—Right of a party to have summons issued—Right to an adjournment when summons prove abortive—Inherent power of Court to prevent abuse of its process under s 151.

The right of a party to have summonses issued or securing the attendance of his witnesses, if applied for before the hearing, is absolute. But the Court has inherent power under S. 151 to prevent abuse of its process, and refuse to issue summonses, where it is convinced that a vexatious desire to obstruct the course of justice is the governing motive of the party applying for summonses.

Though to have summons issued if applied for before the hearing is an absolute right of a party that right does not extend to his being entitled to an adjournment, if for any reason which is an ordinary incident of the proceedings for service of process, the summons fails of its object. When the Court gives reasonable time for securing effective service and its advantage is not owing to anything being left undone which could and should have been done the party guilty of such

C P C (1908) O 16 r 1=(1882, S. 159) -Concld.

laches cannot ask that the trial be prolonged in order to escape from the consequences of his own laches. **Moti v Kanhya. 5 N L R 181.**

2051—C P C O 16 r 1=(1882) s. 159—"Day fixed for the disposal of the suit."

Any day to which a hearing has been adjourned is a day fixed for the disposal of the suit and a party applying for summonses to his witnesses at any time before such day is entitled to obtain them under s 159. **San Sidapa v Nilapa 1890 P J 333.**

2052—C P C O 16 r 1=(1882) S 159. The Court is also bound to examine any witnesses that may be produced on that day (S 181). **Bhikshet v Damodar. 1893 P J 419.**

--O 16 r 1—See O P C (1908) S 132 Case No. (1323) **8 Ind Cas 418.**

C P C O 16 r 2=(1882) S. 160.

Notes—Sub-rule (1) of this rule corresponds to section 160, C P Code, 1882, with some verbal changes. Sub-rule (2) is new; and it has been added for the convenience of expert witnesses, [illegible] there was no provision in the old Code for compensation or remuneration to witnesses for loss of time.

2053—C P C O 16 r 1; (1882—S 159)—Summons to witnesses—Jurisdiction inherent in Court to prevent abuse of process.

Although on application of a party to a legal proceeding summons to a witness will ordinarily issue and [illegible] Court is bound to issue [illegible] summons under S 159, except in cases governed by s. 386, C P C. A Court has an inherent right to prevent an abuse of its own process, and where it is shown that the process is applied for not *bona fide* for the purpose of obtaining any material evidence, the Court will be justified in declining to issue process. **Veerabadran Chetty v Nataraja Dasikar. 14 M L J 329= 28 Mad 28.**

—O 16 r 2—Witness—Expenses of witnesses **See** C P C O 16 r 4 Case No. 2054. **7 M L J 76.**

C P C O 16 r 4=(1882) S. 162.

Notes:—This rule corresponds to section 162 C P Code 1882. The alterations made in this rule are: (1) the substitution of the word "*where*" for "if" and the addition of the words "*reasonable remuneration*" after the word 'expenses' in sub-rule (1) The addition has been made in consequence of the insertion of sub-sule (2) in rule 2.

C P C (1908) O 16 r 4=(1882, S 162) -Contd.

C P C (1908) O 16 r 4=(1882) S. 162.

See Witness-Civil [illegible] Summoning and attendance of witnesses-Expenses of witnesses.

Witness-Civil cases-Expenses of witnesses.

2054—O 16 r 4, O 21 r 11 (2)=Act 14 of 1882 ss.162,169and 235)-Summoned witness not exmined—Fresh attendance—Order for payment of expenses—Validity of—Attachment of property—Civil Procedure Code (Act V of 1908), s. 115—Revision.

A witness who was summoned for [illegible] hearing and whose expenses had been deposited was not examined at that hearing but had to attend again and on an application by the witness payment of his expenses for his further attendance was ordered. The party against whom the order was passed had no property within the jurisdiction of the Court and so the order was transferred to another Court for execution, [illegible] an application made in that behalf. Objection being taken that that the order for payment of the expenses [illegible] not [illegible] order passed under section 162 of the Civil Procedure Code, the petition for attachment was rejected by the Court to which it [illegible] transferred.

Held, on revision, that the first order taken with the second order for transmission clearly shows that the order could be executed by attachment and sale of the properties under s. 162 of the Code.

Held further that as the Munsif to whom the order was transferred for execution refused to exercise [illegible] jurisdiction vested in him by law, the order passed by him could be reversed under section 622 of the old Civil Procedure Code corresponding to section 115 of the new Code.

Ettan Ettan Rajah v Anujan Valia Rajah 7 M L T 76=5 Ind Cas 742.

C P C O 16 r 4 (2)=S 162—Duty of Court to direct witnesses to appear on adjourned date. See **11 M L T 199.**

C P C.(1908) O 16 r 4=(1882, S. 162)
—Concld.

2055.—C P C O 16 r 4 (2)=(1882 s 162)— Where hearing of case postponed, fresh summons not required.

If [illegible] case posted for hearing on a certain day is not heard that day, the court should warn the witness that his attendance will be required on the day to which the hearing of the case is postponed. It is not necessary to issue fresh summons to witnesses. **Subbarayudu v. Chenchuramayya. 24 Mad 200.**

Notes:—Appr: 2 A L J 345.

C P C (1908) O 16 r 7=1882 s 165

See Witness-Civil Cases—Examination of witnesses.

C P C—O 16 r 7—Sanction to prosecute, **A W N 1891, 40.**

C P C O.16 r 10 (1908)=S 168 (1882)

See Cases under:—

Witness—Civil cases—Defaulting wit-[illegible]

C P C O 16 r 11=(1882) s 169

Notes.—This rule corresponds to section 169, C P Code, 1882, with some additions and alterations in the language and phraseology but no substantial change seems to have been made in the meaning.

C P C O 16 r 12=(1882) s 170

Notes.—This section corresponds with sec 170, C P Code, 1882, with some alterations in the language and phraseology.

C P C O 16 r 14=1882 s 171

Notes.—This rule corresponds with section 171 C P Code 1882 with some alterations.

C P C O 16, r 14, O 26, r 9-Suit relating to boundaries of land—Doubt [illegible] to identity of land—Duty of Judge—Procedure to be followed—Inspection of land—Issuing commission--Witnesses to be called by Court—**See** Boundaries. **[illegible] L B R 1=2 Ind Cas 347.**

2056.—C P C O 16 r 14—Jurisdiction—Small Cause suit—Suit to recover price of skins of animals—Evidence—Witness required by Court but not wanted by party.

III C O 29.

C P C (1908) O 16 r 14=(1882, S.171)
—Concld.

A suit to recover the price of skins of certain animals alleged to belong by custom to the plaintiff is not excepted from the cognizance of a Small Cause Court.

Where a Court desires to have the evidence of [illegible] particular witness, whom the defendant does not desire to call, the Court is not justified in insisting on the defendant paying the amount necessary to secure the attendance of the witness, and, on defendant's refusal to do so, declining to issue summons for the attendance of his witnesses. In such a case the correct procedure is to take action under O XVI r 14 of the Code. **Billa v. Chhuta, 159 P L R 1911=10 Ind Cas 35.**

C P C O 16 r.15=1882 s 172

Notes.—This section corresponds with section 172 of the C P Code, 1882. The only change introduced is the substitution of the word "*shall*" for the word "*must*" which occurred in the old section.

C P C O 16 r 16=(1882) s 173

Notes-Sub-rule (1) corresponds to section 173 C P Code, 1882 with some material alterations. The old section ran as follows: "*No person summoned and attending shall depart unless and until* (a) *he has been examined or has produced the document and the Court has risen, or* (b) *he has obtained the Court's leave to depart.*" Sub-rule (2) is new and has been added for the interest of the parties, who are sometimes put to great difficulty for non-attendance of witnesses at subsequent hearings.

C P C O 16 r. 17, =(1882) Ss 174 (1) 175=(1859) Ss 168; 169.

Notes.—This rule lays down in a modified form, the provisions of para 1 of section 174 and the provisions of section 175 of the C P Code. The wordings of the old sections have been materially changed.

2056-A—C P C O 16 r 17=(1882 Ss 174 (1) 175—The section does not apply in the case of appeals, under cl 15 of the Letters Patent from judgments of the High Court in the exercise of its original jurisdiction **Hindu Law—Religious Endowment, 29 Mad 1.**

C P C (1908) O 16 r 18=(1882) s.174

Notes.—This rule corresponds with the last para of section 174, C P Code, 1882 with some additions and alterations. The words *"where any person arrested under a warrant"* have been substituted for the words, *"if any person so apprehended"* which occurred in the old section; and the words *"in default of his giving such bail or security may direct him to be detained in civil prison"* have been added after the words "may release him." The addition seems to be material.

C P C O 16 r 20=(1882) S. 177

1. Applicability 2057—2058
2. Discretion of Court 2059—2066
3. Order of Court requiring party to attend-Disobedience to 2067—2068
4. Dismissal on default of plaintiff to attend 2069—2074
5. Dismissal on default of defendant to attend 2075—2079
6. Miscellaneous Cases 2080—2083

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(1) Applicability

- 1 Applicability to rent suits 2057
- 2 Proceedings in execution of decree 2058

(2) Discretion of Court

- 1 Discretion of Court to summon party as witness 2059
- 2 Discretion in enforcing penalty under the section 2060
- 3 Refusal of applicant for certificate to attend 2061
- 4 Non-attendance of defendant when cited as a witness 2062
- 5 Claim barred by limitation 2063
- 6 Waiver of default by Court 2064
- 7 Failure to produce evidence 2065
- 8 Non-attendance of witness 2066

(3) Order of Court requiring party to attend, Disobedience

- 1 Order of Court requiring party to attend, Disobedience 2067
- 2 Order to one plaintiff in suit to attend and give evidence 2068

(4) Dismissal on default of plaintiff to attend

- 1 Dismissal of suit on plaintiff's non-appearance when summoned as witness by defendant 2069
- 2 Wilful default 2070
- 3 Defendant bonafide requiring evidence of plaintiff 2071
- 4 Appearance of some of several plaintiffs 2072
- 5 Default of plaintiff to appear 2073
- 6 Defendant as witness for plaintiff refusing to produce documents 2074

(5) Dismissal on default of defendant to attend.

- 1 Default of defendant to attend 2075
- 2 Default of party to appear when summoned as witness 2076
- 3 Default of defendant to give evidence 2077
- 4 Failure of defendant to appear 2078
- 5 Defendant not appearing when summoned by plaintiff 2079

(6) Miscellaneous Cases

- 1 Notice to attend, Failure to comply with 2080
- 2 Refusal to answer material questions 2081
- 3 Receipt of order to attend 2082—2083

1 APPLICABILITY.

(1) Applicability to rent suits.

2057—C P C—O 16 r. 20=S. 177. of 1882

S. 177 was applicable to the procedure in suits under the Bengal Rent Act. **Chunder Mohun Mojoomdar v Ketooram Bose.**
4 W R., Act X, 18.

Soopun Khan v Huro Pershad Paul.
4 W R. Act X, 50.

Also s. 166. **Soopun Khan v Huro Pershad. Paul.** **4 W R., Act X, 50.**

(2) Proceedings in execution of decree.

2058—C P C O 16 r 20=S. 177 of 1882.

A court may avail itself in an execution case of the power given by s. 170, Act VIII of 1859, to summon a party to give evidence, and on his failing to comply with that order, to pass judgment against him. **Deshan Hosein v Khodija**
8 W R 64.

C P C (1908) O 16 r 20=(1882, S.177) -Contd.

(1) Applicability—Concld.

Notes.—Ap: 12 W R 34; 5 B H C R O 152. Fol: 19 W R 32. Dist: 11 W R 273; 397; 466; 543; 13 W R 175. Ref: 9 W R 325; 380; 463, 12 W R 26.

II DISCRETION OF COURT.

(1) Discretion of Court to summon party as witness.

2059—C P C O. 16 r 20=S. 177. of 1882.

Where the law allows a discretion to any Court, it presumes that such discretion will be soundly and properly exercised: and where it is shown that the discretion was not so exercised, the omission will be a ground for interference by the superior Court. Accordingly, the Subordinate Judge's order under s. 170 was set aside on the ground that he had not exercised his discretion at all, inasmuch as he had ignored the fact that plaintiff had given very substantial reasons for his inability to attend and give evidence when summoned to do so; and as the Subordinate Judge had held substantially that there was sufficient evidence to prove plaintiff's claim, plaintiff was entitled to a decree, his failure to give evidence notwithstanding. **Ishan Chunder Sen v Onath Nath Deb Cowell 18 W R 16.**

(2) Discretion in enforcing penalty under the section.

2060—C P C O 16 r 20=S. 177. of 1882.

In a case which Act VIII of 1859, s. 170, is provided to meet, the Court ought not to take every thing for granted against the party in fault, but to require the other party to prove his case as far as he can without the desired evidence, to consider well the effect of the default or refusal with reference to the rules of evidence, and to hear what evidence the defaulting party adduces before imposing upon him the penalty of default. **Mahomed Amidoolla v Durbesh Shaikh. 24 W R 314.**

(4) Refusal of applicant for certificate to attend.

2061—C P C O 16 r 20=S. 177 of 1882.

The appellant, having applied to the Judge for a certificate to collect the debts to one R, whose adopted son he claimed to be, referred in evidence to an ikrarnamah of adoption, of which he filed a copy procured from the kazi's books, alleging that the original had been made away with by an agent who had been brought over by his opponent. In the course of re-trial of the case on remand, the Judge required the petitioner to attend for the purpose of examination, and, as after being warned he did not do so, and assigned no good cause for his absence, upheld his former decision, and rejected the application. *Held* that the Judge exercised the powers conferred by s. 170, Civil Procedure Code, 1859 and that it was a proper exercise of discretion to take the course which he did take at that stage of the proceedings. **Seetaram Sahoo v Sheo Golem Sahoo. 19 W R 188.**

C P C (1908) O 16 r 20=(1882 S. 177) -Contd.

(2) Discretion of Court—Contd.

(4) Non-attendance of defendant when cited as a witness.

2062—C P C O 16 r 20 (1908)=S. 177 (1882) –Power of Court before passing decision–Civ. Pro. 1859, S. 170.

The non-attendance of defendant, when cited as a witness to give evidence, is not alone sufficient to justify the decision of the suit against him under this section.

His absence may be an unfavourable circumstance, but the Court will not always be disposed to attach to it such weight as to regard it as justifying a decree in the plaintiff's favour. **Roop Narain Miser v Kasheeram Singh Timbiram 2 N W P 67.**

(5) Claim barred by limitation.

2063- C P C O. 16 r 20=S. 177—Defendant not appearing.

S. 170, Act VIII of 1859, was not intended to empower a Court to decree a claim which on the face of it is barred by limitation, simply because the defendants had been summoned and did not appear. **Doorga Dutt Singh v Kalika Sookul. Gireedharee Singh v Kalika Sookul. 7 W R 46.**

Notes:—Fol: [illegible] W R 289. Ref: 10 B H C R 206.

(6) Waiver of default by Court.

2064—C P C O 16 r 20=S. 177. of 1882.

The provisions of s. 170 of the Code of Civil Procedure 1859 ought to be exercised with the most temperate discretion. Where the Court might have treated one of the defendants as in default, and passed judgment against him under the above section, but instead of doing so passed

C P C (1908) O 16 r 20=(1882 S. 177) -*Contd.*

(2) Discretion of Court—*Concld.*

over the default and made an order adjourning the further hearing of the suit, and on the day to which the hearing was adjourned disposed of the suit under s. 170,—*Held* that the Court by its own act was not in a position to treat the defendant as in default. **Pudiyar Vasudavan Nambudripad v Kayaka Kovilagatha Valia Rany.** **4 Mad H C R 231.**

(7) Failure to produce evidence.

2065 -C P C O 16 r 20=S. 177. of 1882.

In a suit by the patnidar for rent due under a darpatni, defendant was summoned to produce the darpatni pottah & a bynamah which he had produced on a former occasion in a different suit. On his representing that they were lost, plaintiff put in a certified copy of the bynamah obtained from the office of the Registrar of Deeds. *Held* that, as the defendant failed to produce the bynamah or to prove that it was out of his power to do so, the Judge might have passed judgment against him at once under s. 170, Act VIII of 1859. **Tara Chand Banerjee v Boistub Churn Bhudro** **16 W R 196.**

(8) Non-attendance of witness.

2066—C P C O 16 r 20=S. 177 of 1882.

The discretion which a Court had, under s. 170 of Act VIII of 1859, of passing judgment against a party for non-compliance with the Court's order to attend and give evidence or produce documents in a suit was not confined to cases where the party summoning him could not prove his case otherwise than by the evidence of such other party, or where the fact to be proved was solely and exclusively within the knowledge of such other party. **Kashinath Shaha v Dwarkanath Sirkar.** **9 B L R 215; 17 W R 550.** **Ishan Chandra Ghose v Harish Chandra Banerjee.** **9 B L R 218 note; 12 W R 369.**

3 ORDER OF COURT REQUIRING PARTY TO ATTEND—DIS-OBEDIENCE.

(1) Order of Court requiring party to attend—Disobedience.

2067—C P C O 16 r 20=(1882) S. 177, (1859, ss. 126, 170)—Subsequent decree in his favour.—

The plaintiff was ordered to attend and give evidence under s. 170, Act VIII of 1859, but failed to do so. The Court, however, being satisfied with the evidence in support of his case, gave a decree in his favour. *Held*, that the decree was valid. **Bissonauth Mojoomdhur v. Khettur Chunder Sen,** **Marsh, 467.**

Notes:—Ref: 18 W R 16.

C P C (1908) O 16 r 20=(1882, S. 177) -*Contd.*

(3) Order of Court requiring party to attend—Disobedience—*Concld.*

(2) Order to one plaintiff in suit to attend and give evidence.

2068—C P C—O. 16 r 20=S. 177 of 1882.

The Civil Judge, on appeal, reversing the decree of the District Munsif, dismissed a suit brought by two plaintiffs under s. 170 of the Code of Civil Procedure, the ground that the first plaintiff had without lawful excuse failed to comply with the order of the Court requiring his attendance to give evidence. There was no order or summons to the first plaintiff to attend to give evidence in this suit, but a summons was issued to the plaintiff to attend to give evidence in another suit to which the second plaintiff was no party, and which was heard together with this appeal. *Held* (reversing the decision of the Sessions Judge) that non-compliance with the summons to give evidence in the other appeal was not enough to warrant the exercise of the power in this case. S.170 requires that there should be a failure to comply with an order to attend to give evidence in the particular suit. **Arunachella Mudaly v Vencatachella Mudaly.** **[illegible] Mad., H C R 269.**

4 DISMISSAL ON DEFAULT OF PLAINTIFF TO ATTEND.

(1) Dismissal of suit on plaintiff's non-appearance when summoned as witness by defendant.

2069- C P C O 16 r 20=S. 177 of 1882.

A court is not bound to dismiss a case on account of the non-appearance of a plaintiff summoned by the defendant to attend as a witness, when the defendant did not petition for attachment or other legal process to be made by the Court to compel the plaintiff's appearance.

Bustee Narain Roy v Sham Soonder Nundee. **2 W R Act X 48.**

(2) Wilful default.

2070—C P C O 16 r 20=S. 177 of 1882.

The stringent provisions of s. 170, Act VIII of

C P C (1908) O. 16 r.20=(1882, S.177) -Contd.

(4) Dismissal on default of plaintiff to attend—*Contd.*

1859, ought to be applied only in the case of contumacious litigants. **Data Hurrukman Pyne v Oodoy Chand Pyne** [illegible] **W R 247. Thakoor Lall Misser v Bromomoyee Dabee 15 W R 253.**

But not to plaintiffs on whose part there is no proof of cognizance of the issue of [illegible] commission for their examination, or no proof of wilful default. **Data Hurrukman Pyne v Oodoy Chand Pyne. 6 W R 247.**

Notes—Ref: 18 W R 16.

(3) Defendant bonafide requiring evidence of plaintiff.

2071—C P C O 16 r 20=S.177—Non-attendance of plaintiff.

A defendant, who *bona fide* and for [illegible] substantial reason requires the evidence of the plaintiff to be taken, ought not, in ordinary circumstances to have a decree made against him until that evidence has been given. **Roy Dhunput Singh v Prem Bibee. 24 W R 72.**

(4) Appearance of some of several plaintiffs

2072—C P C O 16 r 20=S. 177 of 1882.

S. 170, Act VIII of 1859, authorized dismissal for default only against the plaintiff who failed [illegible] refused to attend, not against the plaintiffs who appeared. **Prosunno Coomar Shaha v Gooroo Pershad Roy. 1 W R 25 Binode Ram Sein v Brohmo Moyee Debia. 1 W R 168.**

(5) Default of plaintiff to appear.

2073—C P C O 16 r 20=S. 177.—Reasons for summoning witness.

In [illegible] suit for the right of pre-emption on the ground that plaintiff was a shafee khalit, defendant, who alleged that plaintiff was only [illegible] benami shareholder, offered to establish his case on the deposition of the plaintiff alone. The latter not appearing on summons, the suit was decreed against him under S. 170, Code of Civil Procedure. On this he appealed, and the Judge ordered the Munsif to give him further time to appear. This was granted, and then extended again and again by the Munsif, who, on the plaintiff failing to appear again, gave a decree against him under the same law as before. The case was then appealed to the Judge, who ordered the case to be tried on its merits, remarking that the presence of the plaintiff was not necessary. *Held* that, as the plaintiff's liability to appear and give evidence had been already determined by [illegible] competent Court, and never denied by himself, he could not take advantage of a technical objection to show that he [illegible] not bound to come because the formalities of the law had not been observed or his evidence shown to be necessary. **Jhoomuck Singh v Jeetun Lall 12 W R 359.**

C P C (1908) O. 16 r.20=(1882 S.177) -Contd.

(4) Dismissal on default of plaintiff to attend—*Concld.*

(6) Defendant [illegible] witness for plaintiff refusing to produce documents.

2074—C P C O 16 r 20=S. 177 of 1882.

In a suit to recover the balance due on [illegible] partnership transaction, the first defendant, who was examined as [illegible] witness for the plaintiff, refused to produce certain accounts relating to the partnership which he was directed to produce by the Civil Judge. Thereupon judgment was given against the defendant under s. 170 of the Code of Civil Procedure. On appeal, the High Court, holding that the accounts were relevant and material evidence in the suit, and that the Civil Judge was justified in requiring the first defendant to produce them, and being satisfied that the accounts were in possession or control of the first defendant, affirmed the judgment of the Civil Judge. **Katakam Venkaiya v Bhupalam Pedda Mullasappah 4 Mad H C R 142.**

[illegible] DISMISSAL ON DEFAULT OF DEFENDANT TO ATTEND.

(1) Default of defendant to attend.

2075—C P C O 16 r 20=S. 177—Examination of parties to the suit.

When a plaintiff alleges that the defendant has a personal knowledge of the matters in dispute and the defendant denies that he has such knowledge, the Court before exercising the discretion of decreeing the suit as upon default, should be satisfied on evidence [illegible] to the existence of such knowledge on the part of the defendant.

Laith Narain Deo v Bolakee Chowdhry W R 1864 [illegible]

C P C (1908) O 16 r 20=(1882, S.177) -*Contd.*

(5) Dismissal on default of defendant to attend—*Contd.*

(2) Default of party to appear when summoned as witness

2076—C P C O 16; r 20 (1908)=s.177 (1882) —Willingness to attend—Lawful excuse.

A defendant's saying that he was willing to attend when he did not attend and showed no reason why he could not, is no lawful excuse for his non-attendance when summoned to attend. What is or is not a lawful excuse must depend on the circumstances of each case. **Doorga Dutt Singh v Jheengoor Jha 18 W R 63.**

(3) Default of defendant to give evidence.

2077—C P C O 16 r 20=S. 177 of 1882.

Where a plaintiff has not given any evidence in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence. **Damoodur Bhooshun v Rugho Nath Panja 12 W R 242**
Thakoor Lall Misser v Brohmo Moyee Dabee 15 W R 253.

(4) Failure of defendant to appear

2078--C P C O 16 r 20=S. 177—Discretion of Court.

S. 170 was discretionary. Under it, the first Court might decide against a defendant on the ground of his failure to appear, even without going in to the plaintiff's evidence, and the lower Appellate Court was equally within the law in going into the whole case on its merits. **Gopal Lal Bose v Kaleenath Mookerjee. 5 W R 89**
Rajchunder Ghose v Koylash Chunder Banerjee 6 W R Act X 86.

(5) Defendant not appearing when summoned by plaintiff

2079—C P C O 16 r 20=S.177 of 1882.

Where the plaintiff gave no evidence at all in support of her case, it was held not just to put in force against the defendant, who, when summoned to appear and give evidence, deliberately declined to do so, the stringent provisions of s. 170, Act VIII of 1859. The exercise of the discretion conferred by that section must be reasonable and judicial. **Aleh Ahmed Sajjadanusheen v Nussebun 17 W R 563.**

C P C (1908) O 16 r 20=(1882, S.171) -*Contd.*

6 MISCELLANEOUS CASES.

(1) Notice to attend—Failure to comply with

2080—C P C O 16; r 20=S. 177 of 1882.

To render a person liable to the penalty prescribed by s. 170, Act VIII of 1859, it must be shown that notice had been duly served on him, and that he had failed to comply with the requisition contained in that notice. **Gooroodass Roy v Greedhur Sein 11 W R 110.**

(2) Refusal to answer material questions—

2081.—C P C O 16 r 20=S. 177—Dismissal of suit.

A judgment passed against a plaintiff under s. 126 of Act VIII of 1859 was reversed by the High Court in special appeal, as there was nothing on the record to show that the party refused to answer any material question relating to the suit. **Krishnaji Nimkar v Vishnu Nimkar. 2 B H C 360; 2nd Ed 340.**

(3) Receipt of order to attend.

2082.—C P C O 16 r 20=S. 177—Non-attendance—Materiality of evidence.

A Court is not justified, under either s. 127 or s. 170 of Act VIII of 1859 in imposing penal consequences upon a party who fails to appear, by passing a verdict against him, unless it is clearly made manifest, first, that he had been ordered or directed to attend and wilfully refused to obey the order or direction; and secondly, that the evidence which he was required to give was really material to the matter in suit. *Quære*—Whether the party must be proved by other evidence to have personally received notice of the order before the penal provisions are applied ? **Raj Chookun Duswandi v Busjeet Tewaree 20 W R 165.**

See **Obhoy Churn Mookerjee v Peeree. Dossia. 22 W R 270.**

2083.—C P C O 16 r 20=S. 177 of 1882.

In a suit for contribution in respect of Government revenue, the defendants, co-sharers were, on the application of the plaintiff, ordered to attend to give evidence, but they failed to appear. The Principal Sudder Ameen thereupon dismissed the suit on the ground that, as the plaintiff's case had not been established, he was not entitled to

C P C (1908) O 16 r 20=(1882 S. 177) —Concld.

(6) Miscellaneous cases—Concld.

a decree simply by reason of the defendant's failure to enter appearance. *Held* the suit should not have been dismissed. In a case where a party summoned to attend as a witness refuses to attend and give evidence, and the party who requires the evidence is unable to make out his case without it, his suit should not be dismissed for want of proof when the points on which he fails depend upon matters of fact which may reasonably be presumed to be peculiarly in the knowledge of the defaulting parties as for instance in the present case the extent of their own shares, and the amount they had paid on account of revenue. **Hemangini Dasi v Ramnidhi Kundu. 1 B L R S. N 10: 10 W.R 158.**

Notes.-See 10 W R 141.

C P C O. 16, r 21.

C P C O 16 r 21—See C P C (1908) S. 132 Case No (1323)— **[illegible] Ind Cas 418.**

C P C O 17 r 1=(1882) S. 156=(1859) S. 146.

Notes.—This rule corresponds to section 156 C P Code 1882 with some variations: In sub rule (2) the word "*every*" has been substituted for the words "*in all such cases*" which occurred in the old section and the words "*beyond the following day*" have been added after the word "hearing" in the proviso.

C P C O 17 r 1=(1882) S. 156,

(1) **Court may grant time and adjourn hearing. 2084—2090.**
(2) **Costs of adjournment 2091—2092.**

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1 COURT MAY GRANT TIME & ADJOURN HEARING.

2084.—C P C O 17 r 1=S. 156.—Pleader throwing up case at eleventh hour.

N's pleader threw up his case at the eleventh hour when N was unable to conduct his own case or find a substitute at once.

Held that though N did not ask for an adjournment the Sub-Judge should have in the interest of justice stayed the proceedings for reasonable time and the District Judge on appeal should have exercised his discretion and carried out the spirit of S. 54 of Regulation II of 1827, and remanded the case for a re-hearing. **Naru v Bayaji 1890 P J 81.**

C P C (1908) O 17 r 1=(1882, S. 156) —Contd.

(1) Court may grant time & adjourn hearing—Contd.

2085.—C P C O 17 r (1)=1882 S. 156=(1859 s. 146—Adjournment of case—Sufficient cause—Suit not fixed for hearing.

Without defining what is the right mode of exercising the discretion vested in the Judge with regard to adjournments, the High Court held that the Judge ought, under s. 146 of the Code, to have granted an adjournment in this case when it was applied for, on the first day after the Judge's return to the district that the applicant really had an opportunity of appearing before the Judge, in order to enable the applicant to file his documents and produce his witnesses, S. 147 Act VIII of 1859 not applying to a case where no day has been fixed for the hearing of the case. **Seetaram Sahoo v Golam Sahoo Bahadur. 18 W R 325.**

2086—C P C O 17 r 1=O P C s. 156. —Adjournment—Sufficient cause.—

In this case 27th June, 1881 was fixed for the hearing. On the 24th June, plaintiff applied to have certain witnesses summoned which was granted. The summons not having been served and the witnesses not attending, he applied for an adjournment which was refused. *Held* that though it was a discretionary matter yet unless there is pressing necessity for proceeding with the case or the application for adjournment is obviously frivolous it should not be rejected. **Jhanda Singh v Dungar Mal. 2 W N 127.**

2087.—C P C O 17 r 1 (1)=S. 156.-Ground for adjournment—Medical certificate.

Where defendant had known for some time previously that his case was coming on and what evidence was necessary, a medical certificate, to the effect that he was confined to his bed by lumbago was held to be no sufficient ground for adjournment. **Elias v Jorawar Mull. 24 W R 202.**

Notes—Ref 31 Cal 150.

C P C (1908) O 17 r 1=(1882 S. 156) *-Contd.*

(1) Court may grant time and adjourn hearing—*Concld.*

2088.—C P C O 17 r 1 (1)=S. 156 of 1882.

Where summons could not be served owing to the dilatoriness of the appellant and the Lower Court refused to adjourn, *held* that the High Court should not interfere. **Gawrava v Kanteppa. 1896 P J 220.**

2089.—C P C O 17 r 1 (1)=S. 156-Adjournment—Procedure.

A karkun in charge of records was ill.

Held that an adjournment ought to have been granted to produce that evidence. **Khan-Derao [illegible] Baslinga. 1889 P J 269.**

2090.—C P C O 17 r 1 (1)=S. 156 and s. 157—Application for restoration of suit-Adjournment—Civil Procedure Code (Act XIV of 1882) ss. 156, 157, 102, 103.—

Semble:—Ss. 156 and 157 of the Civil Procedure Code do not apply to an adjourment which is not made [illegible] the instance of the parties, but which is necessitated by the rules of Court which regulate the disposition of its own business. **Toolsy Money Dassee v Prosad Money Dassee. 2 C W N 490.**

2 COSTS OF ADJOURNMENT.

2091.-C P C (1908) O 17 r 1 (2)=(1882) S. 156-Failure to pay costs of adjournment—Disposal [illegible] suit thereon.

Held, that under s.156 of the C P C, [illegible] Court has no jurisdiction to pass [illegible] order conditional upon payment of costs. **Musthan Rowthar v. Natharsa Rowthar, 4 M L T 200= [illegible] M L J 541.**

2092.—C P C O 17 r 1 (2)=(S. 156)—Adjournment—Order [illegible] to costs—Conditional order—Discretion.

Where, upon the application of the plaintiff the Court made an order for adjournment conditional upon the immediate payment of costs: *Held*,—that although, no doubt, S. 156 of Act XIV of 1882 gives ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment in the circumstances of the case, the Court ought to have adjourned the [illegible] to a subsequent date and made the hearing on that date conditional on the payment of costs before that date, so [illegible] to enable the plaintiff to carry out the order of the Court. **Dhaniram Mahata v Murti Lal Mahata. (1909) 13 C W N 525 =36 Cal 566.**

C P C (1908) O 17 r 1=(1882, S. 156) *-Concld.*

(2) Costs of adjournment—*Concld.*

C P C O 17 r 1—Dismissal of suit for plaintiff's non-appearance—**See** C P C O 9 r 8, Case No. 1755. **5 L B R 75.**

—O 17 r 1—When deposition may be read in evidence—**See** C P C (1908) O 26 r 8, Case No. (2819). **13 C W N 525.**

C P C O. 17, r. 2=(1882) S. 157.

See S. 108.

C P C O 17 r 2—See C P C O 9, r 3, Case No. 1699. **8 M L T 450.**

—O 17 r 2—See C P C O 9 r 3, Case No. 1706. **9 Ind Cas 842.**

—O 17 r 2—Whether appeal lies—**See** C P C O 9 r 8, Case No. 1771. **5 O C [illegible]**

—O 17 r 2—Dismissal of suit for plaintiff's non-appearance—**See** C P C O 9 r 8, Case No. 1759. **7 Bom L R 261.**

—O 17 r 2—Dismissal of suit for plaintiff's non-appearance—**See** C P C O 9 r 8, Case No. 1755. **5 L B R 75.**

—O 17 r 2—Dismissal of suit for plaintiff's non-appearance—**See** C P C O 9 r 8. Case No. 1751. **3 S L R 208.**

—O 17 r 2—Dismissal of suit for plaintiff's non-appearance—**See** C P C O 9 r 8. Case No. 1749. **P R 41 of 1880.**

—O 17 r 2—Application to set aside — Dismissal for non-appearance—Maintainable or not —**See** C P C O 9 r 9, Case No. (1800.) **12 M L J 473.**

—O 17 r 2—Dismissal of former suit for default—Appeal from dismissal order—**See** C P C O 9 r 9. Case No 1817. **30 [illegible] 274.**

—O 17 r 2-When summons duly served. **See** C P C O 9 r 6 Cases Nos: 1723, 1724. **6 P R 1866; 36 Cal 189.**

—O 17 r 2—See C P C O 9 r 7.Case No 1739 **2 N L R 179.**

C P C (1908) O 17 r 2=(1882, S. 157) -Contd.

—O 17 r 2-What amounts to non-appearance of defendant and exparte hearing. See C P C O 9 r 13. Case No 1839 **16 M L J 51.**

—O 17 r 2—What does not amount to an exparte decree. See C P C O 9 r 13 Case No 1864 **35 Cal 1023.**

C P C (1908) O 17, rr 2, 3=(1882) Ss. 157, 158.

See Appeal—Default in appearance.

2093.C P C O 17 rr 2, 3:=(1882 Ss. 157, 158) Dismissal for default of appearance—Plaintiff absent after adducing his evidence.

Where in a case the plaintiff after putting in all his evidence, oral and documentary, fails to appear either in person or by pleader on a subsequent adjourned date, the proper course is for the Court to decide the case under and not to dismiss it for default. **Badam v Nathu Singh 1903 A W N 6=25 All 194.**

Notes—Ref: 5 O L J 260: 34 Cal 235. Diss: 19 M L J 760.

2094-C P C O 17. r 2=Sections 157 and 102 —Absence of party—Dismissing of suit.

After receiving all the available evidence in a suit, the case was adjourned to enable the Court to refer to a record. At the adjourned hearing, one of the parties did not appear, and the suit was therefore dismissed under section 147 (now 157) and 114 (now 102) Civil Procedure Code, as the Court thought it was bound to do so. *Held* that, as the suit had been many times heard, as all the evidence had been taken, and as last adjournment was apparently only for the court's own satisfaction and in order to give the plaintiff time, the court was not at all bound to dismiss the suit. Its proper course was to proceed to judgment or to make such order, other than an order of dismissal, as under section 114 (102) might appear to be just and proper in the circumstances of the case. **Ramratan Shukul v Malajat. (1871) Select Cases Part X No 10.**

2095-C P C O 17 r 2=(1882 S. 157)-Plaintiff and plaintiff's vakil absent-Plaintiff's absence satisfactorily explained—Restoration.

If the plaintiff has shown sufficient reason for his absence, he is at any rate, if his presence is necessary, entitled to ask for the restoration of the case. (19 M L J 760. Fol.) **Venkatchellapathi Chettiar v Periyasami. Udayan. 7 M L J 308=6 Ind Cas 681.**

C P C (1908) O 17 r 2=(1882, S. 157) -Contd.

2096—C P C O 17, r 2=S. 157-Vakalatnama —Reference to arbitration.

The matters in dispute between the parties in this case were referred to the determination of an arbitrator. The arbitrator not making his award within the time fixed by the Court, the Court took the case from the hands of the arbitrator and fixed a day for trying and deciding the case. The order fixing the date was signed by the pleaders for the parties. Upon the date fixed, neither party appearing either in person or by pleader the suit was dismissed under s 157 of the Code of Civil Procedure. That decree being confirmed on appeal the plaintiff preferred this second appeal to set aside the *exparte* decree on the ground that their vakil having become *functus officio* by reason of the reference to arbitration was incompetent to take notice of the date fixed. *Held*, that the mere fact of a reference to arbitration made by a Court under s 508 of the Code of Civil Procedure, would not have the effect of disabling the vakils of the parties from representing them further in the suit. **Bhagwant Rai v Nand Kumar 8 W N 199.**

2097.—C P C O 17, rr 2 and 3 (=Civ Pro Code 1882 Ss 157, 158)—Failure to appear—Failure to produce evidence—Procedure.—

S. 157 refers especially to the case where the defendant fails to appear and there has been no trial: s 158 to a case when there has been a trial and in which the defendant may or may not appear. The former section has regard to the failure of a party to appear, the latter to the failure of a party to produce evidence. **Ganesh Motiram v Deosing 3 C P L R 21.**

2098.—C P C O 17 rr 2 and 3=(Ss 157, 158 of 1882)—Order under sec 158—Scope of s 158.

Any order of the Court under this section must make it plain that it was made under this section and not under s 157 though specific warning that action under s 158 will be taken need not, in order to take such action, be given to the party concerned. If a suit is dismissed under s. 158, a fresh suit will be barred. This section, being very stringent, should be applied only when the facts do not admit of the application of any other section. **Kale Shah v Shahabal Shah.** **80 P R 1899**

Notes :—Ref 30 P R 1906=82 ; P L R 1906; 9 P R 1908.

2099.—C P C O 17 rr 2 and 3 (=Civ Pro Code 1882, ss 157, 158)—Distinction between, in the matter of revival of suit decreed.—

The distinction between s 157 and s 158 is that, where a decree passed under the former section may be revived by application, a decree under the latter section cannot be revived by application; it may, however, be reviewed, or appealed against. **Sheodayal Singh Raj Gond v Kausal Prasad** **11 C P L R 94.**

2100.—C P C (1908) O 17 rr 2, 3=S 157, 158 (1882) O 9 rr 8, 9; (1882 Ss 102, 103,) Pleader applying for adjournment—Effect.

Where on the date of hearing the plaintiff's pleader applied for an adjournment for one hour only and adjournment was granted to enable the pleader for the plaintiffs to consider what course he should pursue. On the case being called on at 2 P M., the pleader for the plaintiffs got up and left the Court. His name was called out and the names of the plaintiffs were also called out. The pleader had not stated that he had no instructions to proceed with the suit. The Judge dismissed the suit.

Held, that the order dismissing the suit was an order under Ss 102 and 157 and not under s. 158 of the Code, and that the plaintiff's remedy was by an application under s 103 of the Code. **Allahdino v. Nawalmal.** **1 S L R 224.**

2101—C P C O 17 rr 2, 3; O 9 rr 8, 9;=(1882 Ss. 157, 158, 102, 103)—Time given to plaintiff to produce evidence—Default in appearance on adjourned date—Statement by plaintiff's vakil that he had no instructions—Nature of order to be passed—What section to be applied—Scope of Ss. 157, 158.

Plaintiff obtained time from Court to produce his evidence on a certain date On that day he did not appear and his vakil stated that he had no instructions. The Munsiff, instead of dealing with the case under S. 157 of Act XIV of 1882, disposed of it under S. 158 on the issues raised.

Held, that there was clearly a default in appearance on the adjourned date, and that the Munsiff was wrong in disposing of the suit under S. 158, C, P. C., as he should have disposed of it under S. 157.

Ss. 157 and 158 of Act XIV of 1882, should, if possible, be read as mutually exclusive. S. 157 deals with cases of failure to appear, and S. 158 with cases of faliure to do the thing for which time has been granted; neither can be treated as an exception to the other, for there may be failure to do the thing for which time has been granted, the parties themselves being present, and there may be failure to appear even when no time is granted to do anything in particular.

When a case is set down for hearing, whether it is on the original or the adjourned date, the first question for the Court is, are the parties in attendance. If both or either of the parties have or has failed to appear, the Court is bound to deal with the matter under Ch. VII. or S. 157 read with Ch. VII, as the case may be. Any other defect in the case or default of any party is a matter for investigation and orders, only after the question of default in appearance has been settled. The appearance of the parties or more correctly the determination of the consequences of non-appearance has a natural precedence over the disposal of matters arising in the trial of the case.

Therefore, if there be default in appearance on the adjourned date of hearing, S. 157 should alone be applied, no matter whether there has or has not been default of the kind referred to in S. 158. It is only in case the parties are in attendance and there is a faliure to do what a party is given time to do, that S. 158 is to be put in requisition.

(23 Bom. 414; 18 M.L. J. 51; 3 M. L. T 225; 22 All. 66; 34 Cal. 235; 5 C. L. J. 260, Fol.; 20 Bom. 736, Fol. 4 M. H C. R. 354 and 4 M. H. C. R 56. Disappr) **Chandramathi Ammal v C S Narayanasami Iyer** **5 Ind Cas 23=19 M L J 760=7 M L T 369=33 Mad 241.**

2102—C P C O 17 rr 2, 3=(1882 Ss 157,158) —Adjourned hearing— Default — Dismissal—Restoration.

A, the plaintiff in a suit, took out processes against his witnesses; they did not how-

C P C (1908) O 17 r 2=(1882, S. 157) —*Concld*

ever, though served, appear on the adjourned date fixed for trial. The pleader for the plaintiff prayed for the issue of a warrant for arrest of one of them. This was refused. The pleader then intimated that he had no further instructions to appear in the suit which was thereupon dismissed.

Held, that the dismissal was not under but was read with. It was, therefore, competent to the plaintiff to apply under Code, to have the order of dismissal set aside.

Scope of sections 157 and 158, Civil Procedure Code, explained. If there are no materials on the record at an adjourned date of hearing, the Court ought to proceed under section 157, Civil Procedure Code. If, however, there are materials, the Court ought to proceed under section 158, Civil Procedure Code. **Marian-nissa v Ram Kalpa Gorain** **[illegible] C L J 260=34 Cal 235.**

Notes.—Fol: 36 Cal 189. Comp: 19 M L [illegible] 760.

2103—C P C O 17 rr 23, (=ss. 157, 158, Civ. Pro Code, 1882)—Date fixed for evidence—Non-appearance of plaintiffs—Dismissal under r, 2 changed to one under r 3.

On plaintiff's non appearance on a date fixed for evidence after settlement of issues, the suit was dismissed under s. 158, Civ Pro Code 1882. An application under s.103, Civ Pro Code 1882, by the plaintiff to restore the case to the file (O IX r 9) was dismissed. *Held* that the suit should not have been dismissed under s. 158, Civ Pro Code, 1882, but for default under s. 157 Civ Pro Code 1882, thereby making s. 103, Civ Pro Code 1882, applicable as the case had not been adjourned in favour of either party for the production of evidence or to cause the attendance of witnesses. **Ram Nath v Munaraj 139 P R 1884.**

Notes.—Ref: 30 P. R. 1906=810 P L R 1906.

C P C O 17 r 3=(1882 S. 158)

(1) Applicability—2104—2106

(2) Powers of Court to dispose of a suit—2107—2109

(3) Default of party to produce-2110—2117

(4) Default of party to cause the attendance of his witness—2118—2125

C P C (1908) O 17 r 3=(1882, S. 158) —*Contd.*

(5) Default to perform any other act necessary to the further progress of the suit—2126—2130

(6) Miscellaneous Cases-2131—2134

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1 Applicability

1 Order dismissing suit 2104
2 Non-attendance—Procedure 2105
3 Order striking off application for sale of attached property—Maintaining attachment 2106

2 Power of Court to dispose of a suit

1 Plaintiff's case disposed of before ascertainment of the value 2107
2 Refusal of pleader—Right of court to proceed under s. 158 2108—2109

3 Default of party to produce evidence

1 Procedure 2110
2 Power of dismissing suit 2111
3 Fresh evidence 2112
4 Dismissal 2113
5 Dismissal of suit after adjournment 2114—2115
[illegible] Dismissal of suit under s.158 altered to dismissal under s. 157 2116
7 Dismissal in default of other evidence 2117

4 Default of party to cause the attendance of his witnesses

1 Power of dismissing suit 2118
2 Procedure 2119
3 Adjournment for process to enforce attendance of witnesses 2120
4 Dismissal of suit for non-attendance of witnesses 2121
[illegible] Suit dismissed, first Court, appeal to enquire into cause of plaintiff's default 2122
[illegible] Want of instruction to pleader-Dismissal of suit—Remedy 2123
7 Dismissal for want of prosecution—Remedy 2124.
8 Second dismissal—Subject to appeal 2125.

[illegible] Default to perform any other act necessary to the further progress of the suit.

1 Plaintiff to pay the cost of preparation of a map-Non-compliance 2126.

C P C (1908) O 17 r 3=(1882, S. 158) -Contd.

2 Order for costs of adjournment—Non-compliance with 2127.
3 Insufficient Court-fee on plaint 2128
4 Failure to pay certain expenses—Remedy 2129.
5 Failure to produce an English translation of accounts. 2130.

6 Mis-cellaneous Cases.

1 Appeal against [illegible] order of the district judge, dismissing the suit under S 158. 2131.
2 Application treated [illegible] review —Review. 2132.
3 Appeal also dismissed—Application to restore appeal 2133.
4 Remand by appellate Court 2134.

O 17 r 3=(1882) S. 158 (1859, S 148)

See Cases under:—

1 Res judicata-Judgments of preliminary points.
2 Appeal—Default in appearance. Case No (500) **10 Mad 270**

C P C O 17 r 3=(1882, S. 158)

See Execution of decree-Transfer of decree for execution &c.

13 W N 28.

1 APPLICABILITY.

(1) Order dismissing suit.

2104.—C P C O O 17 r 3—Order dismissing suit—subsequent suit between same parties. Res judicata.

On the date fixed for settlement of issues defendant was not present and an adjournment was necessary under all circumstances as no evidence had been called for, and accordingly an adjournment was made, a date being fixed for the production by plaintiff of a certain deed and for the hearing of the evidence *ex-parte*. On the date specified, the deed called for was put in and a futher adjournment was asked for and granted. On the second date fixed for plaintiff to produce his evidence he was not present but sent a pleader to ask for a further adjournment. This was refused and the suit dismissed, but it was not clearly recorded that the dismissal was under Section 158 of the Civil Procedure Code. A review of judgment having been applied for and refused, plaintiff subsequently instituted the present suit which was dismissed as barred by reason of the former suit, having been dismissed under Section 158 of the Code.

Held, that though it may not be necessary in order to take action under Section 158 of the Code to give specific warning to the party concerned that action under that section will be taken, there must be something [illegible] the record to show clearly that the adjournment is one which brings the case within the purview of that section and also to make it plain that the order itself is one under that section and not under Section 157 and that this was not the case in the present instance.

Section 158 of the Code is a very stringent one and is only to be applied when the facts do not admit of the application of any other. **Kale Shah v Shahabal Shah.**

80 P R 1899.

(2) Non attendance—Procedure.

2105.—C P C O 17 r 3=(C P C 1889 S. 158) =(1859 S.148)—Non attendance of either party-On adjourned hearing—Procedure.

Where a part heard case has been adjourned and the parties do not appear on the day of adjourned hearing, the Court may order another adjournment to enable the parties to appear. If Court do not pass such an order it must dismiss the suit under ss. 110 and 147 Civ Pro Code. It cannot decide the suit on the record, for s. 148 does not apply in that case. **Sain Das v Mussammat Rajji. 32 P R 1875.**

(3) Order striking off application for sale of attached property but maintaining attachment.

2106.—C P C O 17 r 3=(Civ Pro Code, 1882 s. 158)—Execution of decree.

A decree-holder having attached certain moveable property of her judgment-debtor, applied to have a specified portion of such property sold. The Court executing the decree ordered the decree-holder to pay certain fees for issue of notice to the opposite side for the purpose of [illegible] inquiry as to whether the property sought to be sold was or was not ancestral property and directed that the case should be

C P C (1908) O 17 r 3=(1882, S. 158) -*Contd.*

(1) Applicability—*Concld.*

brought up again on a date named in the order. On that date, the Court passed an order striking off the application for sale on the main and practically the sole ground that the *talabana* required had not been paid, but at the same time specifically maintaining the attachment. *Held*, that such an order could not be taken to have an effect similar to that of an order in a suit under s. 158 of the Civ Pro Code and to be a bar to any subsequent application of a similar nature.

Wilayat Husain v Shafit Begam.
A W N 1893, 12.

2 POWER OF COURT TO DISPOSE OF A SUIT.

(1) Plaintiff's case disposed of before ascertainment of the value.

2107.—C P C O 17 r 3=(Civ Pro Code 1859 s. 148)—Value of the suit under dispute—Power of Court to do so.

Where the value of the suit was under dispute and had not been ascertained, it was held that the record was not complete, and that the Court had no power to dispose of the suit under s. 148, Civ Pro Code reserving the valuation of the suit for a supplementary order as to stamp and costs.

Mussammat Uttur Kour v Atma Singh.
20 P R 1870.

(2) Refusal of pleader—Right of Court to proceed.

2108—C P C—O. 17, r. 3 (=Civ. Pro. Code, 1882, s. 158)—A holiday fixed for hearing of a case to suit plaintiff's pleader-Refusal of pleader to appear on that day.

Where a gazetted holiday was fixed for hearing arguments in a case, by arrangements with the parties and so as to suit the convenience of the plaintiff's pleader, but the latter declined to appear on that day, it was *held* that neither side having objected when the said date was fixed, it was their duty to be present on such day and, in default of their so appearing, the proper course for the Court was to proceed to judgment in terms of s. 158, Civ. Pro. Code. (55P. R. 1898, 82 P. R.1901, Ref.)

Bhagwan Das v Har Pershad.
111 P. R 1906=92 P L R 1907.

C P C (1908) O 17 r 3=(1882 S. 158) -*Contd.*

(2) Power of Court to dispose of a suit-*Concld*

2109—C P C—(1908) O 17, r 3=(1882) S. 158-Mere default of party to attend Court in person—Court not to pass decree against him under S. 158 but to proceed under S. 175.

S. 158 of the Code is applicable only to cases where any party to a suit, to whom time has been granted, fails to do certain specified acts for which time has been allowed. It contemplates cases where the parties have expressly obtained time to produce evidence and does not refer to adjournments by the Court, in the ordinary course, of its own motion. So, where a defendant required to attend Court in person failed to be present on the date of the hearing, the only course open to the Court was *held* to be to proceed under S. 157. In the absence of anything to show that the defendant had expressly asked for time and then made a default, the Court could not pass an order to decide the case forthwith under S. 158 of the Code. **Panna Lal v Bull.**
30 P. R. 1906=82 P. L. R. 1906.

C P C O 17 r 3 Ss. 68, 70, 71 —Execution of decree—Powers of Collector to whose Court a decree has been transferred for execution. **See. A W N 1893, 28.**

3 DEFAULT OF PARTY TO PRODUCE EVIDENCE.

(1) Procedure

2110.—C P C O 17, r 3, O 9 r 13=(Ss 108,158) —Ex-parte decree set aside—No restoring of the decree as such—Default of party to produce evidence—Procedure:—

A Court has no power to restore an *ex-parte* **decree once set aside.** Where the Court is acting under S 158, the proper course for it is to decide the suit as it stood then before it if the Judge could do so, and not to "restore" the *ex-parte* decree once set aside by it. **Raman Chettiar v. Mohideen Sahib.** (1906) **17 M L J 81.**

(2) Power of dismissing suit

2111.—C P C O 17, r 3=(S. 158)—Plaintiff adducing some evidence—Non-service on some of Plaintiff's witnesses.

It is only under very exceptional circumstances, and when no other provisions of the Code are applicable to a case, that resort should be had to the very stringent provisions of S 158 of

(3) Default of party to produce evidence-*Contd.*

the Civ Pro Code. Where four of the witnesses of the plaintiff were examined, it is not open to the Court to dismiss the suit under this section without taking into consideration the evidence on the record, simply because some of the plaintiff's witnesses who had been summoned to attend on the date of hearing were not served with notice. **Kartar v Surasti 9 P R 1908= 28 P W R 1908=98 P L R 1908.**

(3) Fresh evidence

2112.—C P C O 17 r 3= S 158 of 1882.

When a case is remanded by an Appellate Court under s 148, Act VIII of 1859, with a direction that it shall be proceeded with, the Court of first instance has no authority to receive new evidence, nor the lower Appellate Court to decide thereupon. **Padma Lochun v. Sirdar Khan. 8 B L R Ap 91.**

S. C. Puddo Lochun v. Sirdar Khan 12 W R 23.

Notes—See 11 W R 457.

(4) Dismissal.

2113.—C P C O 17, r 3—Failure to produce evidence.

Two cases involving similar issues were ordered by [illegible] Officiating District Judge to be tried together, one of the cases being transferred from the file of the Subordinate Judge to that of the District Judge for that purpose. The District Judge's successor in office dissociated the two cases, and ultimately fixed the 6th February for the hearing of one of them and the 8th April, for the hearing of the other, apparently in ignorance of the order passed by his predecessor. On the 30th January, the plaintiff in the case which was fixed for the 6th February applied for the summoning of witnesses and for a postponement of the hearing. The District Judge granted the application for summons but refused to postpone the hearing of the case. In consequence of this action the attendance of the necessary witnesses could not be procured in time, and, on the 6th February, the District Judge purporting to act under s 158, Code of Civil Procedure, dismissed the plaintiff's suit for default. The plaintiff then appealed to the High Court. *Held* that even if the order of the District Judge under s. 158 of the Code of Civil Procedure could be considered on a proper construction of that section, as a legal order, still the plaintiff might reasonably be taken to have been misled by the action of the Court, and, under the circumstances, the Court had not exercised a sound discretion in dismissing the plaintiff's suit. **Dulhin Sonraj Kuari v Audhan Singh. 11 W N 112.**

(3) Default of party to produce evidence-*Contd.*

(5) Dismissal of suit after adjournment.

2114.—C P C O 17, r 3=S 158—Adjournment for final disposal- Non-appearance of plaintiff.

In a suit, issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal. On that date plaintiff did not appear, and the suit was dismissed under s 148 of Act VIII of 1859. *Held* that as this was not a case which had been adjourned in favour of either party to enable him to "produce his proofs or cause the attendance of his witnesses," the order was not one which could properly be made. **Ryall v. Shern[illegible] 1 Mad 287.**

2115.—C P C O 17 r 3=S 158 of 1882=S.148 (1859).

The first hearing of a suit took place on the 16th November, when issues were settled, and the final hearing of the suit was fixed for the 22nd January following. On the 22nd of January, the plaintiff changed her vakil, and applied by the new vakil for a summons for a witness, and on the 23rd, the new vakil stating that owing to the absence of his witnesses he was not prepared to go on with the case, the Judge dismissed the suit. *Held*, that, under s 148 of the Civil Procedure Code, the Judge was justified in dismissing the suit. **Comalammal v. Rangasawmy Iyengar 4 Mad C R 56.**

Notes.—Fol: 6 M H C R 262 Dist: 4 M H C R 251=1 Mad 287. Ref 10 Mad 270; 272=34 Cal 235=5 C L J 260=18 M L J 51: Disap: 19 M L J 760.

(6) Dismissal of suit under S 158 altered to dismissal under S 157.

2116.—C P C O 17, r 3=S 158—Failure of plaintiff to appear on date fixed in ordinary course for evidence.—

On a date fixed after settlement of issues in a case for the parties to produce their evidence, the plaintiff failed to appear, though the defendant was present. The lower Court therefore dismissed the suit under Section 158 of the Civil Procedure

C P C (1908) O 17 r 3=(1882, S. 158) -*Contd.*

(3) Default of party to produce evidence-*Concld.*

Code, and subsequently rejected an application by plaintiff under Section 103 of the Code to have the case restored to the file, on the ground that such application could not be made in respect of a suit dismissed under Section 158.

Held, that the suit should not have been dismissed under Section 158, but for default under Section 157 of the Code, thereby making Section 103 applicable, as the case had not been adjourned in favour of either party for the production of evidence or to cause the attendance of witnesses, so that Section 158 had [illegible] application to the circumstances of the case. **Ram Nath v. Mumraj** **P [illegible] 139 of 1884.**

(7) Dismissal in default of other evidence.

2117.—C P C O 17, r 3=S. 158—Refusal to allow examination of defendant as a witness.—

The Court of first instance refused to grant plaintiff's application to be allowed to examine second defendant [illegible] a witness on her behalf, thinking the grounds of such application insufficient for the exercise of its discretion under s 162 of the Civil Procedure Code. On the adjourned date of hearing, plaintiff failed to produce any other witness, and the suit was dismissed under s 148. On regular appeal, the Civil Judge considered that the Court of first instance ought not to have refused plaintiff's application, but held that the refusal was a final order not open to question in appeal. On special appeal,—*Held* that the Civil Judge was wrong on the latter point; that if the plaintiff had been prevented from examining the second defendant on sufficient grounds, she had not committed default under s 148; that the decree on the finding of the Civil Court was not maintainable without enabling plaintiff to examine second defendant; and that that finding was conclusive in the special appeal. The decree of both the lower Courts were consequently set aside and the case remanded. **Latchmana Rau Saib v Rogunatha Rau.** **6 Mad H C R 299.**

4 DEFAULT OF PARTY TO CAUSE THE ATTENDANCE OF HIS WITNESSES.

(1) Power of dismissing suit.

2118—O P C O 17 r 3=(S. 158, 1882)—Power of dismissing suit—Plaintiff adducing some evidence—Non service on some of plaintiff's witnesses.

C P C (1908) O 17 r. 3=(1882, S.158) -*Contd.*

(4) Default of party to cause the attendance of his witnesses-*Contd.*

It is only under very exceptional circumstances, and when no other provisions of the Code are applicable to a case, that resort should be had to the very stringent provisions of s. 158 of the O P C. Where four of the witnesses of the plaintiff were examined, it is not open to the Court to dismiss the suit under this section without taking into consideration the evidence on the record, simply because some of the plaintiff's witnesses who had been summoned to attend on the date of hearing were not served with notice. **Kartar v Surasti.** **9 P R 1908=28 P W R 1908=98 P L R 1908.**

Notes—Ref: 142 P R 1908.

(2) Procedure.

2119—C P C—O. 17, r. 3—O. XLI, r. 27—Order for parties to appear with witnesses at adjourned hearing-Default of plaintiff's witnesses—Dismissal of suit.

On a date to which the hearing had been adjourned, the witnesses for the plaintiffs in [illegible] suit pending in the Court of the Subordinate Judge did not appear (the parties with their respective pleaders being present), but neither an application for adjournment was made nor an order to enforce the attendance of the witnesses was asked for by the plaintiff and the Court apparently acting under O. XVII, r. 3, Code of Civil Procedure, dismissed the suit. The District Judge, on appeal, dealt with the case as though the plaintiffs had made a default in appearing and remanded the case for trial according to the law. *Held*, that the Judge had committed an error of procedure and he ought to have proceeded under O. XLI, r. 27 of the Code. **Ram Narain Dube v Jagdeo Misir.** **8 A L J 839=10 Ind Cas 903.**

(3) Adjournment for process to enforce attendance of witnesses.

2120- C P C—O. 17 r. 3=S. 158 of 1882.

Where adjournments are made by a Court, in order to give effect to its processes for compelling the attendance of the witnesses, being thus made [illegible] much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under Act VIII of 1859, s. 148, which contemplates a case where a

C P C (1908) O 17 r 3=(1882, S. 158) -*Contd.*

(4) Default of party to cause the attendance of his witnesses-*Contd.*

party has obtained time to produce his witnesses and has failed to do so. **Pearee Mohun Bera v Shama Churn Mytee.** **19 W R. 34.**

Notes:—Ref: 34 Cal 235; 5 C L J 260.

(4) Dismissal of suit for non-attendance of witnesses.

2121—C P C—O. 17 r. 3=S. 158 of 1882.

The plaintiff, upon whose application the Court of first instance adjourned the hearing of the suit, failed to cause the attendance of his wit[illegible] [illegible] the day fixed for the further hearing, and the Court of first instance threw out the suit, stating that it did [illegible] under s. 110, Act VIII of 1859. Both parties to the suit were represented on that day by their pleaders. The Court of first instance subsequently entertained and rejected an application under s. 119 for a re-hearing. The lower appellate Court admitted and allowed an appeal against the order of the Court of first instance. Both the orders of the lower Courts were reversed, it being held that the Court of first instance must be regarded as having acted under s. 148 of the Code. **Kashee Pershad v Debi Das.** **7 N W., 77.**

Notes:—Over: [illegible] All 66 F B.Dist:34 Cal 235.

(5) Suit dismissed. by first Court-Appeal to enquire into cause of plaintiff's default.

2122—C P C—O. 17, r. 3(=Civ Pro. Code, 1859,s.148)—Plaintiff failing to produce witnesses on fixed date-Suit dismissed by first Court-Duty of Commissioner—Appeal to-enquire into the cause of plaintiff's default.

The Court having asked plaintiff to produce witnesses on a certain day both parties failed to appear that day and the suit was dismissed. Two days afterwards the plaintiff applied to have his case restored to the file on the ground of his being prevented by illness to produce witnesses on that date. The lower Court refused the application.The commission on appeal omitted to decide whether plaintiff had been prevented by any sufficient cause of producing on that date. *Held* that the Commissioner, by this omission erred in law,and that the procedure of the first Court was harsh and injurious. **Kesra Singh v Sahib Singh.** **14 P R., 1870.**

C P C (1908) O 17 r 3=(1882, S. 158) -*Contd.*

(4) Default of party to cause the attendance of his witnesses-*Contd.*

(6) Want of its instruction to pleader—Dismissal of suit—Remedy.

2123—C P C—O. 17, r. 3, O. 9, r.4—Adjourned hearing—Plaintiffs absent.

At an adjourned hearing of [illegible] suit, the plaintiffs were not present and their pleader intimated to the Court that he had no instructions to go on with the case. The suit was thereupon dismissed on the ground that the claim was not proved. The plaintiffs then made an application for restoration under O. IX, r. 4. The Munsif dismissed the application and his order was affirmed by the District Judge. Upon revision, *held* that the application did not lie, the plaintiffs' remedy being by way of appeal against the Munsif's decree.(28 All 66 fol.) **Gaura Bibi v Ghasitiya.** **[illegible] A L J 1265.**

(7) Dismissal for want of prosecution—Remedy.

2124—C P C– O. 17, r. 3=S.158 of 1882.

The plaintiffs instituted their suit in the Court of the Munsif in February 1888. After several preliminary dates, the 26th of July was fixed for the framing of issues. On that date the 17 of August was fixed for the hearing. The plaintiffs however were not ready on the 17th of August to proceed with their case and time was allowed them till the 26th of September. On the last mentioned date the Munsif passed an order dismissing the plaintiff's suit "for default of prosecution." Subsequently the Munsif cancelled this order and proceeded with the trial of the case and ultimately gave a decree in the plaintiff's favour. *Held* that the order [illegible] above referred to dismissing the plaintiff's suit must be regarded [illegible] an order under Chapter VII of the Code of Civil Procedure and not [illegible] one passed under s. 158 of that Code. **Lachman Singh v Bhajan Singh.** **13 W N 84.**

(8) Second dismissal—Subject to appeal.

2125—C P C O. 17 r. 3=S. 158 of 1882.

The first hearing of a suit was fixed for the 10th July 1867. Neither of the parties nor their vakils appeared. Thereupon the Court dismissed the suit under s. 148 of the Civil Procedure Code, but afterwards, upon the application of the plain-

(4) Default of party to cause the attendance of his witnesses—*Concld.*

tiff's vakil, restored it to the file for hearing under s. 119. Plaintiff obtained further adjournments to produce witnesses, the last being an adjournment to the 28th September. On that day the vakils of both parties appeared, but no witnesses, and the Court again dismissed the suit under s. 148 for failure to produce witnesses. On the 22nd of October the suit was again, under s. 119, restored to the file on the application of the plaintiff's vakil, and [illegible] decision was afterwards come to for the plaintiff upon the merits. On appeal the last mentioned decree was reversed, and the decree passed under s. 148 (whether the first or second decree was not specified) upheld, upon the ground that, as s. 119 was inapplicable to a decree passed under s. 148, the Court of first instance had acted without jurisdiction in restoring the suit to the file. *Held*, on special appeal, reversing the decision of the lower Appellate Court, that the first decree of dismissal being [illegible] decree which might have been made under s. 147, was one to which s. 119 might be applied. That the second decree of dismissal was one to which s. 148 alone applied, consequently one subject only to review or to an appeal, and the proceeding had in October 1867, being substantially an application for review, was one which the Court had power to grant. **Ambalavana Padeiyatchi v Sabramania Padeiyatchi.** **6 Mad., H C R 262.**

Notes:—Ref: 10 Mad 270, 18 M L J 51.

[illegible] DEFAULT TO PERFORM ANY OTHER ACT NECESSARY TO THE FURTHER PROGRESS OF THE SUIT.

(1) Plaintiff to pay the cost of preparation of [illegible] map—Non-compliance.

2126—C P C O. 17 r. 3=(1882 S. 158).

Procedure—Order for plaintiff to pay the cost of preparation of a map—Non-compliance of plaintiff with order—Dismissal of suit.

A Court has no power to dismiss summarily a plaintiff's suit merely because the plaintiff has omitted to comply with an order of the court directing him, within a certain time to pay in a sum of money as the cost of preparing a map considered by the Court to be necessary for the decision of the suit. If an order of this kind is

(5) Default to perform any other act necessary to the further progress of the suit—*Contd.*

not complied with, it is the duty of the court to go on and decide the suit on such materials as it has before it. **Sitara Begam v Tulshi Singh** **23 All 462=1902 A W N 149.**

Notes:—Ref: 5 C L J 260; 34 Cal 235. Dist: 36 Cal 189.

(2) Order for costs of adjournment, non-compliance with.

2127—C P C O 17 r. 3=S. 158.—**Costs**, failure to pay.

Where at the request of [illegible] petitioner the Court adjourns the case ordering him to pay the costs of adjournment to the counter-petitioner and the former does not pay it, the Court cannot dismiss the petition under S. 158, C. P. C., unless it had made the payment of costs [illegible] condition precedent to hearing the evidence in the case.

Veerabhadrappa Chetty v Chinnammah **[illegible] M L J 189=21 Mad 403.**

(3) insufficient Court-fee on plaint.

2128—C P C O. 17 r. 3=S. 158.-Dismissal of suit for insufficient Court-fee on plaint.

The Court of first instance, being of opinion that the plaint bore an insufficient Court-fee, and the plaintiff, not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower Appellate Court held that the Court-fee was sufficient, and remanded the case for trial on the merits. *Held* that s. 158 of the Civil Procedure Code was not applicable to the case.

Muhammad Sadik v Muhammad Jàn **11 All 91**

Notes:—Dist: 4 M L J 183 F B. Ref: 12 All 129 F B.

(4) Failure to pay certain expenses Remedy.

2129—C P C O. 17, r. 3=S. 158. Dismissal for failure to pay certain expenses Remedy.

Held that the dismissal of a suit for failure to pay into Court expenses of commission to ascertain the value of the suit and to draw a map, ordered by the Court, was not a dismissal falling under Chapter VII of the Code of Civil Procedure and

C P C (1908) O 17 r 3=(1882 S 158) -Contd.

(5) Default to perform any other act necessary to the further progress of the suit *Concld.*

therefore none of the remedies provided therein were applicable. That order was a decision which if not challenged in appeal became final and would bar a fresh suit for the same relief. **Ram Ghulam Singh v Harnandan** **5 W N [illegible]**

(5) Failure to produce an English translation of accounts.

2130—C P C O. 17 r. 3—Dismissal of suit for plaintiff's failure to produce an English translation of accounts—Failure to take evidence—Legality of dismissal.

Where the plaintiff, who was ordered by Court to produce an English translation of his accounts before the adjourned date, failed to do so, and the Court thereupon dismissed his suit without taking the evidence that plaintiff tendered :

Held, that the order of dismissal was wrong and that the Court was bound to take evidence which was available and adjudicate thereon. **Badar Mal v Gudu Miya** **8 Ind Cas 850 = 9 M L T 163 = (1911) M W N 71**

6 MISCELLANEOUS CASES.

(1) Appeal against an order of the District Judge, dismissing the suit under S. 158.

2131 O 17 r. 3; s 104, O 43 r. 1 = (1888 Ss.158 and 588).

Held, that the District Judge has no power on appeal to pass an order under S. 158, and even assuming that he had, he could only exercise such powers with reference to an appeal before him, and not with reference to the suit in the Court of first instance. The Judge having set aside what was undoubtedly a decree, his order dismissing the suit also amounted to a decree and an appeal lay from his order. **Kusher v Jugrag Singh.** **10 O C 245.**

(2) Application treated [illegible] review-Review

2132—O. 17 r. 3; O. 41 r. 19; S. 114, O. 47 r. 1 = (1882 Ss. 158, 558, 623).

Limitation Act (XV of 1877), Schedule 11. Article 168—Suit dismissed in default—Appeal against dismissal also dismissed in default—Application to restore appeal made after expiry of 30 days.

C P C (1908) O 17 r 3=(1882, S 158) -Contd.

(6) Miscellaneous cases—*Contd.*

A suit was dismissed under s. 158 C P C. The plaintiff appealed, but the appeal was dismissed by the Divisional Judge in default of prosecution. An application to restore the appeal was made after the expiry of 30 days prescribed by the Limitation Act for such application. Notice was issued to the defendants to show cause against the granting of the applications, and the Divisional Judge after issue of the notice was succeeded by another Judge, who re heard the appeal and upheld the order of the original Court. The plaintiff applied for revision.

Held, that the order passed under s. 158 of the Code was illegal and the Case must be tried on the merits.

It was contended that, the application to rehear the appeal having been made after the expiry of 30 days and the period not being extendable the order of dismissal became final.

Held, that treating the application as one for review, there was no irregularity in the proceedings of the lower appellate Court. (33 All 462 Ref) **Kashi Ram v Gopi Mal** **7 P L R 1910 = 6 Ind Cas 482 = 124 P W R 1910.**

( ) Appeal also dismissed—Application to restore appeal.

2133- C P C O 17, r 3; O 41, r 19, (Ss 115 158, 558, 623—Limitation Act (XV of 1877) Sch II,—Suit dismissed in default Appeal against dismissal also dismissed in default—Application to restore appeal made after expiry of 30 days- Application treated as review—Review.

A suit was dismissed under S. 158, C P C. The plaintiff appealed but the appeal was dismissed by the Divisional Judge in default of prosecution. An application to restore the appeal was made after the expiry of 30 days prescribed by the Limitation Act for such applications. Notice was issued to the defendants to show cause against the granting of the application and the Divisional Judge who re-heard the appeal upheld the order of the original Court. The plaintiff applied for revision. *Held:* that the order passed under s. 158 C P C was illegal and the case must be tried on the merits (83 All 462 Ref to). It was

C P C (1908) O 17 r 3=(1882, S. 158) -*Concld.*

(6) **Miscellaneous cases**—*Concld.*

contended that the application to re-hear appeal having been made after the expiry of 30 days and the period not being extendable the order of dismissal became final *Held*, that treating the application as one for review there was no irregularity in the proceedings of the lower appellate Court. **Krishna Ram v Sahi Mal.**

11 P L R 18.

(4) Remand by Appellate Court.

2134—C P C O XVII r 3 =S. 158 of 1882.

The terms of s 148, Act VIII of 1859, do not prevent an Appellate Court, on good and sufficient cause shown, from remanding a case disposed of thereunder, in order that justice may be done between the parties. **Lochun Mundul v Wuzeer Paramanick.** **13 W R 464.**

—O 17 r 3:—**See** C P C O 17 r 2. Case No 2093 **25 All 194.**

—O 17 r 3—Dismissal of former suit for default —Appeal from dismissal order. **See** C P C O 9 r 9 Case No 1815. **A W N 1898, 44.**

—O 17 r 3—Application to set aside dismissal for non-appearance maintainable or not. **See** C P C O 9 r 9. Case No 1791. **34 Cal 235.**

—O 17 r 3—Court's inherent power to set aside exparte decree. **See** C P C O 9 r 13 Case No 1956 **17 M L J 81.**

—O 17 r 3—What amounts to non-appearance of defendant and exparte hearing **See** C P C O 9 r 13. Case No. 1839. **16 M L J 51.**

—O 17 r 3—Dismissal of suit for plaintiff's non-appearance. **See** C P C O 9 r 8 Case No 1747 **5 Ind Cas 499.**

—O 17 r 3—**See** C P C O 9 r 3. Case No 1706 **9 Ind Cas 842.**

—O 17 r 3—**See** C P C O 9 r 1. Case No 1689 **10 Ind Cas 770.**

—O 17 r 3 Dismissal of suit for plaintiff's non-appearance **See** C P C O 9 r 8. Case No 1749 **P R 41 of 1880.**

C P C O 18 rr 1, 2 (1)=1882-S. 179.

See (1) Right to begin.

(2) Witness—Civil Cases—Examination of witnesses.

(3) Evidence-Civil Cases-Made of dealing with evidence.

2135—C P C O 18 rr 1; 2 (1), O 18 rr 2, (2) 3 (3)=(1882 Ss. 179, 180)——Right to begin "The other party shall then state his case" ..Right to begin—Defendant supporting plaintiff must begin before defendant opposing him —"Plaintiff", meaning of——Judicature Act, s, 100.

If some of the defendants in a suit support wholly or partly the plaintiff's case they must address the Court and call their evidence before the defendants, really opposed to the plaintiff's case commence their case. The word "plaintiff" means every person asking relief against another person. **Hagi Bibi v H H Sir Sultan Mahomed.** **10 Bom L R 327.**

—O 18 r 1—Order of remand in a Small Cause nature. **See** C P C O 43 r 1. Case No 3174. **101 P R 1910.**

C P C (1908) O 18. r 2 (2), 3=1882 S. 180.

See Cases under.

(1) **Witness—Civil Cases-Examination of witnesses.**

(2) Right to begin.

C P C (1908) O 18 r 4=1682 S. 181. **See** Witness-Civil Cases Examination of witnesses.

C P C O 18 r 5=(18 2) S. 132.

Notes This rule corresponds to section 182, of the C P Code, 1882, with this modification that the words "*and also in the presence of the parties or their pleaders,*" which occurred in the last part of the old section, have been omitted from the present rule.

C P C O 18 r 7=(1882) s 185A cl (3).

Notes—This rule corresponds to cl (3) S. 185A of the C P Code,1882,with some verbal changes. Under section 138, the Local Governments of both the Provinces have authorized all the Judicial Officers to record evidence in English.

C P C O 13 r 9 = (1882) S 185.

Notes.—This rule corresponds to section 185, C P Code, 1882, with the omission of the words "*with his own hand*" which occurred in the last sentence of that section. This rule has been practically rendered useless by the notifications of the Local Governments under section 138.

2136—C P C O 18 r 13; Civil Procedure Code (Act XIV of 1882 sec 189)—Recording the substance of evidence.

Held, setting aside the judgment and decree of a Small Cause Court Judge and directing a new trial, that the evidence was not recorded in accordance with s. 189 of the Civil Procedure Code (9 C W N 418 Fol).
Chethru Gope v Sri Charan Bhagat. 9 C W N 420.

2137—C P C O 18 r 13. (Act XIV of 1882 sec. 189)—Recording the substance of evidence.

Where a Judge of a Small Cause Court in recording the evidence did not give the substance of the evidence of each witness but merely a short abstract of the whole evidence,

Held, that this was not a compliance with the provisions of s. 189 C P C. **Amritha Shaha v Panchkori Shaha 9 C W N 418.**

Notes.—Fol: 9 C W N 420.

C P C O 18 r 15 = (1882) S. 191.

Notes.—This rule corresponds to section 191, C P Code, 1882, with some alterations and omissions. Some words and phrases of the old section have been changed and replaced by more appropriate words and phrases. No change seems to have been made in the meaning. The proviso to section 191 of the old Code has been omitted, probably in view of section 150 of this Code, which has rendered the proviso, unnecessary.

See Cases under:—Judge—Power of Judge.

2138—C P C O 18 r 15 = S. 191—Hearing of suit—Power of Judge, to deal with evidence taken down by his predecessor.

A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. *Held* that the only power given by the Civ Pro Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one, that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities. **Jagram Das v Narain Lal 7 All 357.**

Notes:—Fol: 8 All 35. Con: 8 All 576 F B. Ref: 10 All 80.

2149—C P C O 18 rr. 15; 33, O 20 r 1 = (1882 ss. 191 and 198)—Suit tried partly by one Judge and partly by another Preliminary order.

This suit was tried in the District Court partly by one Judge and partly by another. In a preliminary order the first Judge came to certain findings and directed that the final decree should take a certain shape. The Judge who finished the case disagreed with his predecessor and gave a different decree to that ordered by the first Judge.

Held, that it was the decision of the second Judge that was a decree that was appealable, and not the order of the first Judge.
Ma Nyo v Ma Yauk 4 L B R 256.

2140 C P C O 18 r 15 = S. 191—Judge's power to deal with evidence taken down by his predecessor.

Held, that though under s. 191, Civil Procedure Code, the evidence taken by his predecessor

C P C (1908) O 18 r 15=(1882, S. 191)
-Concl.

may be used by the Judge who finally decides the case "if he thinks fit," this permission in no way authorizes a Court to decide a cause which it has not really tried.

Sheo Baksh Singh Oudh S. C 110.

—C P C O 18 r 15—See—Transfer of Civil cases—General cases. 26 Mad 595,

C P C (1908) O 18 r 15 & Sec 33, O 20 r 1=1882 ss. 191 & 198,

See—Judgment—Form and contents of judgment.

2141—C P C O 18 r 15, O 20 r 1—Evidence recorded by one judge-Power of successor to decide—Transfer of case—Notice to parties.

Though S. 191 (O 18 r 15) provides for the case of a judge dying or leaving the Court before the conclusion of a suit and gives his successor power to deal with the evidence, as if he himself had taken it down, it does not empower the judge to decide a case on evidence taken down by his predecessor, without giving notice to the parties and giving them an opportunity of being heard before judgment is pronounced. **Sardar Mahtab Singh v Musst. Sobha Kaur** 110 P R 1886.

Notes:—Ref: 91 P R 1904.

C P C O 18 r 16=(1882) S. 192.

Notes—This rule corresponds to Sec 192 C P Code. The words "and judge shall, if necessary, correct the same and shall sign, it" have been added in sub rule.

—O 18 r 33

See—C P C O 18 r 15 Case No 2139.
4 L B R 256.

C P C O 19 r 1=(1882) S 194.

Notes:—This rule corresponds to section 194, C P Code, 1882, with the omission of the words "*of first instance and any Appellate Court*" which occurred in the old section, The words have been omitted probably on the ground that they are unnecessary, as the words "*any Court*" include both original and Appellate Courts.

C P C O 19 r 2=(1882) S. 195.

Notes—This rule corresponds to section 195, C P Code, 1882, with this variation only that the word "*deponent*" has been substituted for the word "declarant" which occurred in the old section.

C P C (1908) O 19 r 3=1882 S 196.

See Practice—Civil cases—Affidevits.

C P C O 20 r 1=(1882) S 198.

Notes:—This rule corresponds to section 198, C P Code, 1882, with some alterations and omissions. The words "*after the evidence has been duly taken and the parties have been heard either in person or by their respective pleaders or recognized agents*" have been omitted, and in their place, the words "*after the case has been heard*" have been substituted. The omission seems to have been made on the ground that they were superfluous.

—O 20 r I—

See C P C O 18 r 15. Case No 2139.
4 L B R 256.

C P C O 20 r 2=(1882) S. 199.

2142—C P C O 20 r 2 (1882 s 199)—Judgment written when Judge on leave—Delivery by successor in office—Validity.

Where a Judge who had heard a case took leave, before putting his judgment in writing, and his judgment subsequently written was delivered by his successor in office.

Held, that the judgment was properly pronounced, the provisions of S 199, Civil Pro. Code, having been complied with.

Rani Sundar Koer v Chandreshwar.
11 C W N 501=34 Cal 293.

2143 C P C O 20 r 2 (1882 s 199)—Judgment, written by a Judge after his transfer.

A judgment was written by a Judge after he was transferred from the District and it was pronounced by his successor.

Held, that s. 199 of the Civil Procedure Code 1882, afforded a complete answer to the objection that the judgment was illegal. **Girjashankar v Gopalji.** 7 Bom L R 951=30 Bom 241.

2144—C P C O 20 r 2 (1882 s 199)—Judgment, written after Judge was transferred—Validity—Judgment reserved too long.

C P C (1908) O 20 r 2=(1882, S.199) -Concld

A Judge who heard the evidence in the case is entitled, under s. 199 of the Code of Civ. Pro. to write his judgment and send it to his successor for delivery, although the judgment was written by him after he left the judicial post which he was occupying when he heard the case (11 C W N 501; 34 Cal 293,*appr.* 7 Bom L R 951; 9 W R I and 17 W R 475, Ref). **Behari Sahai v Srimati Thakurani Kastura Kumari Ghatwalin.**

12 C W N 682 (F B)=7 C L J 666= 4 M L T 33=35 Cal 756.

C P C (1908) O 20 r 2=1882 S 199.

See Judgment-Civil Cases-What amounts to.

2195—C P C O 20 r 3 (O C. S. 202)-First judgment deciding case but deferring passing decree till succession certificate filed—Subsequent judgment reversing decision arrived at in first judgment—Legality:—

The District Judge in appeal on 20th May 1908, recorded [illegible] judgment to the effect that the plea raised in appeal by the defendant that he had not been given a sufficient opportunity to prove his case in the first Court was of no force, but deferred passing a decree until the plaintiff has filed a succession certificate. Before the certificate was filed, however, on the 25th May 1908, the District Judge heard further arguments and gave judgment allowing the appeal and remanded the case to the lower Court to enable defendant to prove his case. *Held* that the second judgment was inconsistent with the first and illegal, and that a decree must be passed according to the first judgment.-**Kishun Kuar v Ganga Prasad**

6 A L J 54; 31 All 153.

C P C (1908) O 20 r 3=1882 [illegible] 209.

See Judgment-Amendment of Judgment.

C P C O 20 r 3—

See C P C (1908) S 148. Case No (1396) **13 O C 28.**

C P C O 20 r 3—Disallowance of claim to property attached-

See C P C (1908) O 21 r 61.Case no (2560) **1 M L J 478.**

2147—C P C O [illegible] r 4-(old s. 203)Object—Section discretionary.—

C P C (1908) O 20 r 4=(1882, S.203) -Concld.

This section, though not requiring Judges of Small Cause Courts to give reason for their decision on simple questions of fact, does not empower them to decide difficult questions of law in an arbitrary and off-hand manner, without assigning their reasons for the same. The discretion given in this section must be exercised in a reasonable and judicial manner and if it is not so exercised, the Chief Court can revise such order. **Hari Mal v Nikka, 78 P R 1895.**

2147—C P C O 20 r 4=(1882—S 203)-Subordinate Judge invested with small Cause Court powers—Judgment—Reasons for the Judgment.

The Court of a Subordinate Judge invested with Small Cause Court powers is governed by paragraph (1) of S. 203 of the Civil Procedure Code, 1882. The judgment written by a Subordinate Judge as a Court of [illegible] Small Cause need not therefore contain more than the points for determination and the decision thereon. (23 Bom 382; 8 Bom 230; 12 Bom 31: 9 Bom 174; [illegible] Bom 270 Ref) **Narayan v Bhaga. [illegible] Bom L R 327 =31 Bom 314 F B.**

C P C O 20, [illegible] 4—Judgment not defective merely because no specific issues framed—**See 5 M L T 215.**

—O 20 r 4—Procedure to be followed in appealable cases—**See 4 P W R 1907= 27 P L R 215.**

C P C (1908) O 20 r 4 and O 20 r 5= 1882 [illegible] 203, 204.

See Judgment Form and contents of judgment.

2148—C P C O 20 4=(old [illegible] 203)—Limit of discretion given under.

This section being merely permissive, the discretion thereby given must be judicially exercised. Where intricate legal questions are involved there must be something on the record to satisfy the superior Court that the Judge has not ignored any material considerations.
Sarat Chand v Bombay Baroda and Central India Railway Company. 41 P R 1896.

Notes:—Fol 57 P R 1901.

2149—C P C O 20 r 5=(1882 S 204)-Decree, from of findings on issues not essential to the determination of a suit or appeal not to form part of decree.—Practice.

C P C (1908) O 20 r 5=(1882, S.204) -*Concld.*

Held, that although it is advisable that in appealable cases a Court should record its findings upon important issues in a suit or appeal other than the issue or issues upon the determination of which the decree is based, the findings on such issue or issues ought not to form part of the Court's decree, (5 W R P C 63. Ch D at pp. 41 and 43 referred to), **Baldeo Singh v Dharam Kunwar.** **26 All 234=1904 A W N 6.**

2150.—C P C O 20 r 5 O 41 r 23 O 41 r 31=(1882 Ss.204,562,574)-Dismissal of a suit on some one of the issues—Jurisdiction of Court to determine other issues.

In a suit for ejectment the main issues in the case related to the validity of the plaintiff's lease and the character of the defendant's holding. The first Court held that the plaintiff's lease was not valid, but instead of dismissing the suit on that one point entered into the merits and found on the evidence that the defendants had a permanent right and could not be ejected on a notice to quit. The lower appellate court affirmed the first court's judgment on all the points. The High Court reversing the findings on the first point held that the plaintiff's lease was valid. Per *Rampini* J.—That the case should be remanded for the determination of the nature of defendant's tenancy inasmuch as the lower courts had no jurisdiction to determine such issues after having held on the first issue that the suit was not maintainable. *Held* by *Maclean*, C J agreeing with *Mitra*, J.—That the lower courts had jurisdiction and very properly exercised that jurisdiction in deciding all the issues, and it was not necessary to remand the case, there being the finding of fact that the defendant's rights were permanent. (10 Cal 1095 and 11 Cal 544 dist. 4 Mad 134 foll. 5 W R P C 63 foll. 6 Cal 319 declared overruled by 11 Cal 301 P C Foll.) **Ismail Khan Mohomed v Hari Charan Pal.** **9 C W N 60.**

C P C O 20 r 6=1882 s. 206 1.

Notes.—Sub-rule (1) of this rule corresponds to para. 1 of section 206 C P Code 1882 with this modification that the words "*as stated in the register*" which followed the word "claims" in the old Code have been omitted. Under the present Code, therefore, the contents of the decree are not to be prepared by reference to register but by reference to the pleadings, so that the contents may be clear and unambiguous.

C P C (1908) O 20 r 6=(1882 S. 206) (1)-*Contd.*

Sub-rule (2) corresponds to para. 2 of Section 206 of the old Code with this modification that the words "*by whom or out of what property*" have been added. The addition is no doubt an improvement. The other changes are only verbal. Sub-rule (2) also includes the provisions contained in section 219 of the old Code.

Sub rule (3) of this rule corresponds to section 221 of the old Code 1882, with some verbal changes only.

See Cases under:—

(1) Appeal orders.
(2) Decree—Alteration or amendment of decree.
(3) Limitation Act 1877 Arts 177, 178.
(4) Superintendence of High Court Civil Pro Code Ss. 115, 622.

C P C (1908) O 20 r 6=1882 S. 206 Paras 1, 2.

See.- Oudh Rent Act XXII of 1886 S. 145. **10 Cal 141.**

C P C O 20 r 6 s. 152. **See Costs.**

—O 20 r 6 S. 152—Pleader's fees how to be calculated in a suit for pre-emption. Oudh Civil Digest paragraph 288, Rule 4—Decree, amendment of-Legal Practitioners. **7 O C 43.**

C P C O 20 r 6 S. 152 Sch II rr. 16, 20, 21 —Award Case No (29) **4 O C 82.**

—O 20 r 6 and s. 152 —Application for amendment of order absolute not a step in aid of execution. Execution of decree. **A W N (1905) 108=2 A L J 287=27 All 575.**

—O 20 r 6 —See C P C (1908) S. 115 Case No (1309). **28 Cal 177.**

—O 20 r 6—See Cases under C P C (1908) S. 152.

C P C (1908) O. 20 r.6 = (1882, S. 206 (1)-Concld.

—O 20 r 6 (3)—See C P C (1908) S. 35 Case No (119). **A W N (1892) 215.**

—O 20 r 7—Effect of dismissal of appeal. **See** O P C O 41 r 11 Case No 3050. **30 All 290.**

C P C S. 35 O 20 r 8 (218)—Costs, order for -Alteration of.

See —Practice. **1902 A W N 98**

C P C O 20 r 9=1882 S. 207.

Notes.—This rule corresponds to section 207 C P Code 1882 with additions and alterations. The words "*the decree shall contain a discription of such property sufficient to identify the same*" have been added after the words, immoveable property" and the words "*can be*" have been substituted for the word "is" which occurred in the old section. This rule is similar to rule 3 of Order VII.

2151-C P C O 20 r 9 s 207 Civ Pro Code 1882 Decree—Omission to specify boundaries or numbers of immoveable property decreed-Details in the plaint to be read in the decree.

In this case, the decree of the first Court described the property decreed as the property "in suit" without specification of *kharsa* numbers or boundaries and so also did the judgment. There was no variance with the judgment nor any clerical or arithmetical error, calling for an amendment under s. 206 Civ Pro Code. The executing Court, however declined to execute in the absence of full details in the decree. *Held*, that the Court should have read into the decree the deatils given in the plaint and should have proceeded to execute the decree with the help of those details. **Gordhan Das v Rughnandan Das.** **74 P R 1905 = 182 P L R 1905.**

Notes:—Ref 48 P R 1906 = 104 P L R 1906.

—O 20 r 9—Power to dismiss appeal without sending notice to lower court—See C P C O 41 r 11. Case No 3035.

8 Ind Cas 941.

C P C 20 r 10 = 1882 Sec 208. **See** Execution of decree—Mode of execution—Alternative decree.

2152.—C P C O 20 r 10 (S 208).

Held, that Section 208 of Act X of 1877, does

C P C (1908) O 20 r 10 = (1882 S.208) -Concld.

not require that in every suit for moveable property, the decree shall be for the delivery of that property in the first instance, with an alternative decree for the value, if delivery cannot be given. The object of the Section is limited to providing for an alternative decree only in those cases where the Court considers it proper to direct the restoration of the property in dispute.

Mussammat Rukman v Ganga Ram
P R 81 of 1880.

2153.—C P C O 20, r 10 ; O 21, r 31 = (1882 Ss. 208 and 259)—Decree for moveable property—Alternative decree for money—When alternative decree enforceable.—No option to Judgment-debtor-

In a decree for moveable property the money amount is inserted under S 208 an alternative if delivery cannot be had. The judgment-debtor is given no option in such a case either to surrender the property or to pay the money. The alternative portion of the decree (for recovery of the money) only comes into operation when after putting in force. S 259, C P C it is found impossible to obtain the property ordered to be delivered. **Manavikraman v Moyankutti Mudaliar.** **13 M L J 444.**

C P C O 20 r 11 (1882) S 210.

Notes :—This rule not only authorizes the Court to direct the amount of a money decree by instalments, but it also authorizes the Court to make an order postponing the payment of the decretal amount for a specified time.

"The Committee have added words to sub-rule (1) in order to override the ruling of Bombay High Court in the case of 4 Bom 96, as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India"-See Notes on Clauses by the Committee.

The words "*with or without interest, notwihstanding any thing contained in the contract under which the money is payable*" have been inserted in sub-rule (1) to override the Bombay case above referred to. In that case it was held that the lower Courts had no jurisdiction, without the consent of the parties, to substitute, for the contract made by them, an order relieving

C P C (1908) O 20 r.11=(1882 S.210) -*Contd.*

defendant from payment of interests on future instalments, except on overdue instalments only.

(1) Decree may direct payment by instalments 2154—2159.

(2) Order after decree for payment by instalments 2160—2165,

See cases under :—

(1) Decree—Alteration or amendment of decree.

(2) Interest, Omission to stipulate for etc,—Contracts.

(3) Limitation Act, 1877, Art 179—Order for payment at specified dates.

—O 20, r 11.—Negotiable Instruments.
2 N L R 179.

C P C (1908) O 20 r 11—Suit maintainability conveyance execution of, by Court-Rights of parties under the conveyance, how to be enforced. **See** C P C (1908) S 47, Case No (430).
11 M L T 18.

1 DECREE MAY DIRECT PAYMENT BY INSTALMENTS.

2154.—C P C O 20, r 11 (1) (=Sec 210, Civ Pro Code, 1882)—Lenders and borrowers—Suit on promissory-note—Equitable mortgage as security for loan—Decree for payment of claim by instalments.

Where the suit was on a promissory-note, but it appeared that, as security for the loan, the plaintiffs held the title-deeds of a house, or in other words, an equitable mortgage, and the Court ordered payment of the claim by instalments, *held* that, if the plaintiffs had pursued all their remedies and had sued to have their lien declared, and for a mortgage-decree for sale, the defendants would have had time given within which to pay, and that if the lenders abandon their proper remedy in order to avoid one of the consequences of the original contract with the borrower, it is not unreasonable or inequitable that the Court should, as far as possible, put the borrowers in the same position as if the lenders had sought for their proper remedy.

Allaneappa Chetty v Mirajam Bee.
1 L B R 81.

C P C (1908) O 20 r 11=(1882 S. 210) -*Contd*

(1) Decree may direct payment by instalments—*Contd.*

2155.—C P C O 20, r 11 (1)=Section 210—Decree payable by instalments.

Held, that Sec 210 of the Code of Civil Procedure under which the Court has no sufficient reason being shown authority to order that the amount, when the decree is for the payment of money, shall be paid by instalments, is not applicable to a decree in a suit for the recovery of a debt by sale of immoveable property which has been hypothecated as security for the payment of the debt

Amir Chand v Karm.
49 P R 1887.

2156.—C P P C O 20, r 11 (1)-(= Civi Pro Code, 1882, s 210) Instalment-bond—Power to pass decree payable by instalments.

Where an instalment-bond provided that, in default of payment of any one of the instalments, the whole amount would be recoverable, *held*, that the Court had no jurisdiction, without the consent of the parties to pass a decree for payment by instalments. (4 Bom 96 Fol).

Buldeo Das v Dasaundhi Khan
187 P L R 1901.

2157—Civil Procedure Code (1908) O. 20 r. 11 (1)—Discretion—C P C S. 210—Decree payable in instalments.

The discretion vested in a Court under O 20 r. 11 to make a decree payable in instalments must be judicially and not arbitrarily exercised. The mere fact that the defendant is hard pressed is not by itself a sufficient reason to justify a decree for instalments spread over for many years.

Balgobindram Bhakat v Chhedilal Shah
11 C L J 431=6 Ind Cas 552.

C P C (1908) O 20 r 11=(1882 S. 210) -*Contd.*

(1) Decree may direct payment by instalments—*Concld.*

2158.—C P C O 20 r 110 (1)=S. 210.

Sec 210 is not applicable to suits to have a mortgage-debt realized out of the mortgaged property. **Balwant v Babaji. 1886 P J 90.**

2159.—C P C O 20 r 11 (1)=C P C s 210—Instalment decree.

A sued *B* for Rs. 10, 275 and got a decree with costs and interest at 6 per cent, but the amount was made payable by the decree in ten equal half-yearly instalments as *B* was "in an embarrassed condition." *Held* that as the decree injuriously affected plaintiff's interest it must be set aside and the amount made payable in a lump sum with interest at 6 per cent. **Bishen Chand v Jang Bahadur. 2 W N 102.**

(2) ORDER AFTER DECREE FOR PAYMENT BY INSTALMENTS.

2160.—C P C O 20, r 11 (2) and O 34 r 6—Personal decree against mortgagor—Court's discretion to direct payment by instalment—Judicial discretion—Second appeal.

In making a decree under O 34, r 6 of the Code, against a mortgagor personally, the Court may direct the payment of the decretal amount in instalments under O XX, r 11 of the Code.

Whether or not the Court exercised a sound judicial discretion in making the order cannot be reviewed in second appeal. (15 C L J 431 Dist.) **Bidhu Shekar v. Sudhury Mahatabudin. 15 C W N 1083.**

2161.—C P C O 20, r 11 (2)=S. 310-Application after decree for an order for payment by instalments—Contents of application.

Held, that an application by a judgment-debtor, although it did not actually state that it was under Section 110 of the Code of Civil Procedure, but which was in every respect what a petition under that section would have been, and which was presented within the period of limitation prescribed for the presentation of such application, although the word *ikrarnama* was used in it, was, as the subsequent conduct of the parties showed that they treated it, an application under Section 210 of the Code of Civil Procedure.

C P C (1908) O 20 r 11=(1882, S.210) -*Contd.*

(2) Order after decree for payment by instalments—*Contd.*

(61 P R 1886, 26 P R 1894 and 12 All, 571, distinguished.) **Nabi Bakhsh v. Gori Mal. 96 P R 1900=23 P L R 1901.**

2162.—C P C O 20 r 11 (2)=(1882 S 210)—Money decree—High Court's power to order decree amount payable by instalments:—Under S. 210, C P C., the High Court has the power to make its money decree payable by instalments. **Poma v. Gillespie, 31 Bom 348=9 Bom L R 143.**

2163.—C P C Order 20, Rule 11 (2)=S 210 Decree by the District Munsif—Order staying execution for one year.

Section 210 of the Civil Procedure Code of 1882 enables the Court to order payment of the decree amount by instalments. The new Code expressly confers such power by Order XX, Rule 11. The Code of 1882 did not take away the inherent powers of the Court to do justice.

Palaniappa Chettiar v Velayuta Pillai. 7 M L T 151=5 Ind Cas 421.

2164.—C P C O 20 r 11 (2), S 115=(1882 Ss 210, 622)-Bengal Tenancy Act-Rent suit-Instalment decree, power of court to make—High Court's power of revision:—

A decree for rent under the Bengal Tenancy Act cannot be made payable by instalments, S 210 of the Civil Procedure Code not applying to such a decree.

Where a Munsif made an order for the payment of the amount of rent decreed by instalments he committed an error of law only and not an error in the exercise of his jurisdiction within S 622 Civil Procedure Code. **Shibh Narain Mookerjee v Baikuntha Nath Isar. 11 C W N 857.**

2165.—C P C O 20 r 11 (2)=(1882, S. 210)—Execution of decree—Payment by instalments—Agreement to give time for satisfaction of judgment-debt—Limitation Act (XV of 1877), 2nd Schedule, Articles 175, 178, 179.

C P C (1908) O 20 r 11=(1882 S. 210) —*Concld.*

(2) Order after decree for payment by instalments—*Concld.*

Appellant obtained a decree against the respondents on the 3rd February 1888, and applied for execution thereof on the 25th October 1888. A warrant was directed to issue, but on the 27th November 1888, both parties put in a petition reciting that an arrangement had been made between them, by which the debt was to be paid by instalments and praying that the sanction of the Court might be given thereto. The proceedings were thereupon ordered to be filed, a separate order of even date being recorded in the proceedings that the property should remain under attachment but not be brought to sale. On the 8th April 1892, the appellant filed an application in which, after reciting the former arrangement, it was prayed that the respondents might be summoned with a view to recovery of the sum still remaining due, and on the 5th July 1892 the appellant again applied for execution by attachment of the judgment-debtor's property.

Held, that the order of the 27th November 1888 was not one falling under Section 210 of the Civil Procedure Code, inasmuch as the application leading to that order did not purport to be under that section, nor was it presented within the period of six months prescribed by Article 175 of the 2nd Schedule of the Limitation Act for the presentation of applications under that section.

Held, further, that the said order was one sanctioning an agreement to give time for "the satisfaction of the judgment-debt" within the meaning of Section 257 A of the Civil Procedure Code, and that, as the mere sanction by the Court of an agreement under that section does not "alter," the decree, the decree to be executed was the decree dated the 3rd February, 1888.

Held, also, that inasmuch as the applications of the 8th April 1892 and of the 15th July 1892 were applications for "execution or to take step in aid of execution," they were applications to which Article 179, and not Article 178, of the 2nd Schedule of the Limitation Act was applicable, and that consequently the decree of the 3rd February 1888 was time-barred. (12 All 571 and 61 P R 1886, followed; 5 All 596 not followed.)
Nanak Chand v Anant Ram 26 P R 1894.

C P C O 20 r 12=(1882) Ss 211 and 212=(1859) s 197.

Notes.—This rule corresponds to sections 211 and 212, C P Code, 1882, with several additions and alterations. The most important change introduced by this rule is that *mesne profits* shall be ascertained in the suit and not in execution. The Court may pass a decree for rents or *mesne profits* if it can do so without directing an equiry.

"We anticipate that there will be a substantial saving of time, and consequent expense, from the provision requiring that mesne profits shall be ascertained under the decree itself and not as have in the execution proceeding." *See the Report of the Special Committee.*

The definition of the expression "mesne profits" is given in section 2 (12).

Clause (ii) is new, there was no similar provision in the Old Code, and it has been inserted for the benefit of judgement-debtor, whose liability for mesne profits will cease after giving notice through the Court of his relinquishment of possession,

Sub-rule (2) is also new. It provides that at first a preliminary decree directing enquiry for the ascertainment of the mesne profits shall be passed and then the final decree shall be passed in accordance with the result of such enquiry.

For the meaning of the expression "mesne-profits," see sec 2 (12),

(1) Decree for possession and mesne profits 2166—2171
(2) Decree under cl I (6) and (c) is an interlocutory order 2172—2173.

C P C (1908) O 20 r 12=(1882 s 211.)

See Mesne profits assessment in execution & suits for mesne profits **30 Cal 506.**

C P C—O. 20. r. 12, s. 2 (12)—Mesne Profits—Mode of assessment. **2 Bom L R 709**

(1) DECREE FOR POSSESSION AND MESNE PROFITS.

2166.—C P C O 20 r 12 S. 2 (12)=(1882 s. 211)—Trespasser—Allowance of expenses of collection of rents to a trespasser against whom a decree for mesne profits has been passed—Principle upon which such expenses should be allowed or disallowed.

In estimating the profits which the owner of land is entitled to recover from a trespasser, the costs of collecting rents, which are ordinarily incurred by the owner, should be allowed to the trespasser only where such trespasser entered on the land in the exercise of a *bona fide* claim of right. But when the trespasser is altogether tortious and malicious, in other words when the trespasser has entered or continued on the property without any *bona fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the court in estimating damages to allow the wrong doer even such charges as would ordinarily but voulutarily be incurred by an owner in possession. (1 All 518 fol; L R 1892 A C 75; L R 27 I A 110 ref 23 All 252 distinguished.) **Dungar Mal v Jairam.**

1902 A W N 90=24 All 376.

Notes:—Dist 6 A L J 327.

2167.—C P C O 20 r 12 S. 2 (12)=(1882 s. 211)—Assessment principle of—Jote and Khamar lands—Decree-holder not a cultivator—Deductions to be made in case of khamar lands-Interest, rate of—Civil Procedure Code (Act XIV of 1882) Sec 211.

In the assessment of mesne profits, two different principles are adopted, one applicable to the case of the rent-paying lands or *jote* lands, and the other applicable of the *khamar* lands.

The decree holder, though not himself a cultivator is to be regarded as the potential, and therefore the actual cultivator of the specific plots which were cultivated by the judgment-debtors from whom he succeeded in obtaining possession. The occupation of *khamar* lands in the direct cultivation of the *maliks* very nearly approximates to the occupation of *raiyati* lands held by ordinary cultivators.

The deduction to be made from the value of the produce of the *khamar* lands on account of the risk and supervision of the cultivation carried on by persons in the position of the decree-holder in addition to the ordinary costs of cultivation, may be calculated at half the usual rate on account of collection charges allowed in the case of rent-paying or *jote* lands. Five per cent on the value of the actual produce of the *khamar* lands is a sufficient allowance to meet the costs of supervision and any other incidental charges.

A claim for mesne profits includes interest on such mesne profits. Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by section 211 of the Civil Procedure Code, and in the exercise of a proper discretion, the higher rate of 12 per cent, should continue till the obtaining of possession by the decree-holder and thereafter at the usual Court rate. **Ijjatulla Bhuyan v Chandra Mohan Banerjee.**

7 C L J 197=12 C W N 285.

2168.—C P C O 20 r 2 s.2 (12)=(1882 S. 211)—Mesne profits-Ascertainment-Principles-Decree-holder in possession himself.

When land is raiyati and both the true owner and the trespasser are, under ordinary circumstances, merely rent receivers, assessment of mesne profits should be made on the basis of fair and reasonable rent. (9 W R 445 and 3 C W N 748 rel:) But when a raiyat himself, an actual cultivator, is dispossessed of his field, the measure of damages should be the value of the crops. (16 W R 21, & 13 W R, 37 relied upon.). There is no distinction in respect of assessment of mesne profits between raiyati land held by a raiyat and the proprietor of private land ordinarily cultivated by him except as to the costs of cultivation. So where a zemindar obtained a decree for possession against a trespasser of his *zarait* land which was in the direct possession of the former. *Held*, that the decree holder was entitled to get from the defendant as mesne profits the price of

C P C (1908) O 20 r 12=(1882, S 211) -*Contd.*

(1) Decree for possession and mesne profits—*Contd.*

the crops raised on the land, less the expenses of cultivation.(17 W R 156 and 6 C W N 409 ref to.) **Laljee Shahay Singh v F C Walker.**

6 C W N 732.

Notes.—Ref 12 C W N 650; 12 C W N 285= 7 C L J 197; 35 Cal 1000.

—O 20 r 12.—Interest on mesne profits when claimable—**See** Interest—Special Cases.

33 Cal 329.

2169—C P C O 20 r 12=S. 211 of 1882—Court-fees—Set off claimed in a written statement.

Where in a suit for rent, the question on account of payment made by him for cesses payable by the plaintiff on account of years previous to those for which rent was claimed.

Held, that the payment cannot be treated as part-payment of the rents sued for but as an antecedent debt. The claim was therefore, in the nature of a set-off and Court-fees must be paid for the same. (Dictum of Banerji; J in 8 C W N 174 not Fol.) **Guise J. J v Anantha Ram Rathi**

10 C W N 199.

2170.—C P C O 20 r 12 S. 2 (12)=(1882 S. 211)

Three years—Appellate decree confirming original decree-Period up to which mesne profits can be recovered.

Where a decree awarding future mesne profits under s. 211 of the Civil Procedure Code is affirmed by an appellate Court the three years from the date of the decree until the expiration of which alone mesne profits are recoverable under that section should be calculated not from the date of the original decree but from the date of the decree of the Court of appeal. **Indar Bahadur Singh v Bijai Bahadur Singh. 5 C W N 52=10 M L J 290 =23 All 152 P C=27 I A 209.**

Notes.-Diss 17 M L J 495, 31 Mad 28. Fol; 35 Cal 1017. Ref 29 Cal 758 F B; 30 Cal 660 F B.

2171.—C P C O 20 r 12 s.2 (12)=(1882 s.211) -Mesne profits awardable after institution of suit.

Under S. 211 C P C mesne profits can be granted only up to three years subsequent to the decree although the party dispossessed may recover possession in execution beyond that period. The words "*whichever event occurs*" should be construed strictly. (23 All 152= 27 I A 209, 24 Bom 149 (Ibid) 345 Fol.) **Trailokya Nath Roy Chaudhuri v Jogendra Nath Ray.**

35 Cal 1017.

C P C (1908) O 20 r 12=(1882, S. 211) -*Contd.*

(1) Decree for possession and mesne profits— *Concld.*

2 DECREE UNDER CL 1 (6) & (C) IS AN INTERLOCUTORY ORDER.

2172.—C P C 1903 O 20 r 12 (2)-Determination of principle for ascertaining mesne profits—Decree—Appeal.

An order by which a Court determines the principle whereupon mesne profits are to be assessed, and directs their ascertainment by a Commissioner,is an interlocutory order in a pending suit and not appealable as a decree. (19 Cal 132 (F B); 5 Ind Cas 278 relied upon. 29 Cal 622 Ref.) **Dalgliesh v Nandan Misser.**

13 Ind Cas 186.

2173—C C P O 20 r 12 (2)=1882)S,211—Suit and decree for possession—Mesne profits.

Where a decree is made under s.197 of Act VIII of 1859 proceedings for ascertaining the amount of mesne profits are proceedings in continuation of the original suit, and until the amount is settled it cannot be said that the decree is for specific amount. The words 'for the execution of a decree' refer only to the execution of the decree for the land and cannot refer to the execution of that which has not taken the form of a decree.

Dildar Hossein v Mujcedunnissa.

4 Cal 629.

See **Krishnan v Nilakandan.** **8 Mad 137.**

Notes-Appr: 19 Cal 132 F B. Fol: 14 Cal 50; 22 Cal 425; 8 Mad 137 Ref: 28 Bom 416.

—O 20 r 12—See C P C (1908) S. 34 Case No (112) **33 Cal 1232.**

—O 20 r 12—See C P C (1908) S. 2 cl 12 Case No (49) **L B R 1872-1892, 451.**

—O 20 r 12—See C P C (1908) S. 2 cl 12 Case No (50) **9 M L J 334.**

C P C (1908) O 20 r 12=(1882, S.211)

—Concld.

—O 20 r 12 —"Date of decree" for mesne profits—Date of ascertainment—Date of decree. **See** C P C (1908) S.48. Case No 882.

6 C L J 462.

—O 20 r 12 -**See** C P C (1908) S. 2 cl 12 Case No (51) **2 Bom L R 978.**

C P C O 20 r 13=(1882) s. 213.

Notes—This rule corresponds to section 213, C P Code, 1882, with some additions and alterations. The words "*where a*" have been substituted for the words "when the" in the beginning; the words "*before passing the final decree, pass a preliminary decree*" have been added to sub-rule (1), and the words, "*within the local limits of the Court in which the administration suit is pending,*" have been added to sub-rule (2). The other changes are mere verbal.

C P C (1908) O 20 r 13=1882 S. 213. See Administration.

—O 20 r 13-Before the receipt of such assets **See** C P C (1908) S. 73. Case No (1060j).

31 Mad 502.

2174—C P C O 20, r 13 (=s. 213, Civ. Pro. Code, 1882)—Administration suit—Jurisdiction of Civil Court.

S. 213, Civ Pro Code, recognises the possibility of administration suits being instituted and tried under the Code, providing for them accordingly. The jurisdiction as to such a suit does not depend upon whether the deceased person is one to whose estate the Indian Succession Act is applicable.

Mussammat Rukman v Brij Mohan Lal.

68 P [illegible] 1881.

C P C O 20 r 14=S. 214 (1882),

Notes—This rule corresponds to section 214, C P C, 1882. But several material alterations and additions have been introduced in this rule. Sub-rule (2) and its clauses (*a*) and (*b*) are altogether new: and Sub-rule (1) is somewhat similar to sec 214 of the old Code, but several material alterations and additions have been made in it, as will appear on a comparison.

C P C (1908) O 20 r 14=(1882, S.214)

—Concld.

"These amendments are based on the rulings contained in the decisions of the High Court of Allahabad at 6 All 370, 455 and 11 All 164.

Having regard to the opinion expressed in 34 Mad at page 463 we have thought it right to make it clear that title vests without [illegible] instrument of transfer. To require a transfer now, might throw a cloud over [illegible] numberless titles rest on the assumption by long practice that no instrument of transfer was necessary." **See** *Notes on Clauses by Committee.*

C P C (1908) O 20 r 14=(1882) s. 214. See Case under: —**Pre-emption.**

—O 20 r 14—Decree for Pre-emption:-**See** C P C (1908) S. 47, Case No (570).

67 P R 1892.

C P C O 20 r 15=(1882) S. 215.

Notes—This rule corresponds to section 215, C P Code, 1882, with several additions and alterations: The word *where* has been substituted for the word "when" in the beginning; and the sentence, *or the taking of partnership accounts; before passing a final decree; [illegible] preliminary decree declaring the proportionate shares of the parties*, and the words, *or be deemed to have been dissolved*, have been added.

The additions and alterations in the rule seem to have been made in accordance with the observations of the Hon'ble High Court in the case of 7 Cal 428, in which their Lordships observed as follows: "The Subordinate Judge should have followed the course pointed out in Forms 132 and 133 of Schedule IV, C P Code, 1882 (App D, Forms 21 and 22), and at the first hearing should have determined whether there had been [illegible] partnership; what were its conditions; was it dissolved or ought to be dissolved; and who were the parties interested and in what shares; and upon determining these questions, should have directed accounts to be taken; and after the accounts had been taken, should have made a final decree."

C P C (1908) O 20, r 15=S. 215 (1882) **See** Partnership-Suits respecting partnership.

—O 20 r 15—See Small Cause Court--mofussil—Jurisdiction. **137 P L R 1901.**

C P C O 20 r 16=(1882) s. 215A.

Notes—This rule corresponds to section 215A, with some additions and alterations. The word, *in*, has been substituted for the words "where a suit" in the beginning, and the word, *any*, has been substituted for the word "all;" and the words "*before passing its final decree*," and "*pass a preliminary decree*" have been added. The alterations are not material.

O 20 r 16=S. 215A.

See—Appeal—Decrees Case No (438) **18 Mad 73.**

—O 20 r 16—Suit for accounts—Procedure—Fixing date for accounts—Accounts—Suit for accounts. **A W N (1905) 1.**

—O 20 r 16—Preliminary decree—Appeal against such decree—Court-fees—Court Fees Act, 1870, S. 7 (IV) (b). **150 P R 1908.**

2175—C P C O 20 r 16—C P C S. 215-A—**Agency—Accounts—**Principal and agent—Right to account.

The fact of agency being established, it is the duty of the court to fix a date for furnishing of accounts, and once the plaintiff has shown that the defendant is an accounting party, it is for the defendant to prove the amount of his receipts of disbursements. Before passing the final decree therefore the court ought to direct the usual agency accounts to be taken. (13 I A 123 and 1 A L J R 317 foll.) **Reghunath v Ganpati. 1 A L J 722.**

2176—C P C O 20 r 16=(1882 S. 215A)-Suit for accounts by principal—No set off pleaded by agent—Involves an undertaking to pay whatever is found due to agent—No claim for set off necessary—Decree in account cases.

A suit for accounts by a principal against an agent, where the agency is not denied, necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to the defendant by him on the taking of accounts, and it is unnecessary that the defendant should plead a set-off or counter-claim.

Hence, where a suit was brought against an agent for rendition of accounts, and the agent expressed himself as ready and willing to render the accounts, but alleged that, on such accounts being taken, money would be found to be due to him without specifically praying for a decree, and the Court granted a decree to the agent upon the finding that money was really due to him, *held*, that the decree was justified with reference to the provisions of Ss. 215-A and 216 of the Code of Civil Procedure (1882). **Parmanand v Jagat Narain. 7 A L J 543=6 Ind Cas 162=32 All 525.**

C P C (1908) O 20 r 16=(1882 s. 215A) -*Concld*

2177—C P C O 20 r 16; O 41 r 5=(1882 S 215 A, 545)—Appeal against preliminary decree for account—Power of Appellate Court to stay further proceedings.

Where an appeal is pending in the High Court against a preliminary order made by a subordinate Court under s. 215-A, C P C, the High Court having seizin of the appeal can, apart from the question whether the case falls within s. 545 C P C., make an order staying the carrying out of such order pending the hearing of the appeal. **Balkishen Sahu v Khugno. 8 C W N 572=31 Cal 722 F B.**

Notes—Fol: 33 Cal 927=3 C L J 67. Dist: 31 Cal 1081. Ref: 34 Cal 1037 F B; 9 C W N 123; 3 C L J 29; 11 C W N 1030 F B; 6 C L J 298 F B.

C P C (1908) O 20 r 19=(1882) s 216.

See Cases under:—Set off.

C P C O 21 r 1=(1882) s. 257.

Notes Clauses (*a*), (*b*), and (c) of sub-rule (1) corresponds exactly with section 257 of Act XIV, of 1882. Sub-rule (2) is new. It has been inserted for the benefit of both the decree-holder and the judgment-debtor and to relieve the Courts from the difficulty which generally arises with regard to decree-holder's claim for costs and interests. After service of notice of deposit upon the decree-holder, he will not be entitled to claim any costs or interests. The notice must be in writing.

Sub-rule (2).—"This sub-rule has been inserted on the suggestion of the British Indian Association."—*See the Report of the Select Committee.*

2178—C P C—O. 21, r. 1=(1882) S. 237—Decree, payment of—Judgment-debtor.

A Judgment-debtor has the right, under S., 257, Civil Procedure Code, 1882, to elect to pay the money into Court. **Madhav v Ravji.** **1 Bom L. R. 644.**

2179—C P C—O 21, r. 1—Decree-Payment of money—Payment into the Court—Court closed on the date of payment—Payment made on the opening of Court.

It was provided by a decree that, if the plaintiff paid Rs. 100 by the 10th April 1909 to defendants, the property in dispute would belong to the plaintiff by ownership; otherwise, the ownership would rest with the defendants. The plaintiff did not pay the money to the defendants but elected to pay the money into Court. And as the Court was closed from the 10th to 13th April, 1909, the payment was made into Court on the 14th April 1909. The lower Court held, that, as the money had by the terms of the decree to be paid to the defendants, the plaintiff had no option to pay it into Court; and that, therefore, the payment into Court was not in compliance with the terms of the decree.

Held, that Rule 1 of Order XXI of the Code provided that all money payable under a decree should be paid into Court or out of Court to the decree-holder. The rule enacted that payment into Court is a valid compliance with a decree, even though the decree directed payment to the decree-holder. **Wana Ravji v Natu Murha.** **12 Bom L R 818.**

2180—C P C—O.21 r.1=(1882 s. 257)—Whether agreement under the section bars execution of original decree.

A decree passed by a District Court was transferred to a Sub-Court for execution. Since such transfer, the parties agreed that the decree-amount should be paid by instalments, and applied to the Sub-Court to record satisfaction of the decree and the Sub-Court did record accordingly. The judgment-debtor paid some instalments out of Court and committed default. The decree-holder, thereupon applied to the District Court, that passed the decree, to execute the decree by arrest of the judgment-debtor in respect of the instalments in arrears. This petition was dismissed. The decree-holder, then, applied for execution of the original decree itself and applied for stay of proceedings till the disposal of this appeal which was one against the order of dismissal of the application for the execution of the decree, so far as it concerned the instalments due under the agreement come to between the parties since the original transfer of the decree to the Sub-Judge. The question for decision, under the circumstances, was whether the original decree was executable in its original condition or as modified by the agreement above alluded to or whether the decree was so completely extinguished as to be incapable of execution and so as to necessitate a fresh suit on the agreement, by reason of the agreement taking the place of the original decree and by reason of satisfaction being recorded by the Sub-Judge. *Held*, the agreement and the record of satisfaction thereof did not render the original decree unenforcible in execution; the effect of the record of satisfaction merely amounted to striking the execution-proceedings off the register of pending cases. The lower Court ought to have given effect to and executed, the original decree after excluding the modifications ought to be imported under the agreement. (11 Cal 671; 20 Cal 38; 31 Cal 832; 19 Bom 546. 28 Bom 393; 24 Mad 683; 24 All 282 and 38 P. R. 1904, Refd to.) **Naman Ram v Muhammad Nawaz Khan.** **27 P L R 1905.**

2181—C P C—O. 21 r. 1=s. 257 Civil Procedure Code of 1882—Payment into Court—Order for payment of costs of day.

An order was made that the defendant should pay the costs of a day. The defendant's attorney lodged the amount in Court, treating the order as decree under s.257. *Held* that the word 'decree' in s. 257 does not include the order in this case.

Shanks v Secretary of State for India. **12 Mad 120.**

2182—C P C—O 21 r 1=(1882 S. 257)-Death of decree holder, if relieves judgment-debtor of duty of payment—Mode of payment—Delay in payment of instalment—Interest.

The death of the decree-holder does not relieve the judgment-debtor of the duty of paying up the decretal debt in one of the several modes specified in S. 257, C. P. C. (1882). He should either deposit the amount in Court as directed in cl (*a*) or should take directions from the Court under cl. (*c*).

C P C (1908) O. 21 r. 1=(1882 S.257) *-Contd.*

Where the judgment-debtor, upon the death of the decree-holder, failed to deposit the balance due under an instalment decree till long after the date fixed for the payment of the instalment.

Held—That the judgment-debtor was liable to pay interest for the period during which the instalment remained unpaid. **Narendra Chandra Lahiri v Charu Chandra Singh,**

14 C W N 148=5 Ind Cas 63.

2183—C P C O, 21, r, 1=(S. 257)—Execution of decree—Alteration of decree by consent of the decree-holder and one of the judgment—debtors—Limitation:—

While property of one of the judgment-debtors was under attachment, the decree-holder and the judgment-debtor agreed that the decree should be satisfied by instalments. This agreement was accepted by the Court and embodied in the decree. —*Held*, that the judgment-debtor was estopped from denying his liability under the modified decree and the mere fact that execution of the decree was barred by limitation against the other judgment-debtors, was not sufficient to extinguish his liability. **Banvari Lal v. Abdul Ghafar Khan.**

10 P L R 27.

—O. 21 r. 1—Judgment debtor's right to apply for certifying payment.

See C P C O 21 r 2. Case No: (2230).

I W N 168.

— O. 21 r. 1—Judgment debtor's right to apply for certifying payment.

See C P C (1908) O. 21 r 2. Case No:—(2228).

8 W N 82.

—O. 21 r. 1 —Payment without notice.

See C P C O 21 [illegible] 2. Case No:—(2224).

29 P R 1871.

—O. 21 r 1—Suit by judgment—debtor to recover money paid out of court.

See C P C (1908) O 21 r 2. Case No:—(2285).

66 P [illegible] 1877.

—O 21 r 1—Court not bound to issue process upon original decree.

See C P C O 21 r 1. Case No:— (2304).

7 M H C 387.

C P C (1908) O. 21 r.1=(1882, S. 257) *-Concld.*

—O 21 r 1—Sanction of court as to agreements relating to judgment debt.

See C P C O 21 r 2. Case No:—(2223.)

4 O C 284.

C P C O 21 r 2=1882, S. 258.

Payment out of Court to the decree-holder

Notes— This rule corresponds to section 258 of the C P Code of 1882, with [illegible] additions, alterations and omissions.

In sub-rule (1) the word "*where*" has been substituted for the word "if;" the words, "*of any kind,*" have been added after the word "decree;" the words "*or if any payment is made in pursuance of an agreement of the nature mentioned in* S.257A have been omitted; and the words. *and the Court shall record the same accordingly,* have been added after the word 'decree.' These are the changes introduced in sub-rule (1).

The substitution of the words "*decree of any kind*" for the words "a decree" which occurred in the old section is material, as it has set at rest the diversity of judicial opinions which hitherto existed. The expression "*decree of any kind*" includes, money-decree, mortgage-decree, and all other decrees under which money is payable. The substitution seems to have been made by adopting the principles laid down in 28 Mad. 473, F. B.; 30 All 248; 7 C L J 581 and 31 Cal 863. In all these cases it was held that this section applies to proceedings in execution of mortgage-decree. It has rendered the cases reported 24 Mad 412; 8 C W N 102 and 25 Cal 703, obsolete and inoperative.

No material change has been made in sub-rule *(2)*, except the omission of the words "*fails to appear on the day fixed and having appeared,*" which occurred in para 2 of the old section.

In sub-rule (3) some important change has been introduced, as will appear on a comparison of the provisions of this sub-rule with para 3 of the old section, which ran as follows:—"*unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.*" On comparison it would appear that the most important change made in sub-rule (3) is, the omission of the words "*as a payment or*

C P C (1908) O 21 r 2=(1882, S. 258) -*Contd.*

adjustment " from para 3 of the old Code. By the above omission it has now become clear that a Court executing a decree, cannot recognize a payment or adjustment made out of Court which has not been certified, *for any purpose whatsoever*. The above change seems to have been introduced by adopting the principle laid down in *12* All 509; and although that ruling was subsequently overruled by the Full Bench case of 26 All 36, the Legislature has adopted the law as laid down in 12 All 509, where it has been held that a Court executing a decree is not competent to take into consideration, payments made out of Court for the purpose of deciding whether or not the application is barred by limitation. By the amendment introduced in sub-rule (3), the several rulings of the High Courts in which contrary view was taken have been superseded; and the superseded rulings have been inserted under the heading. "*uncertified payments may be proved to save limitation.*" Those rulings are no longer the law and have become obsolete.

" The committee have omitted certain words from the last para of s. 258 of the Code in order to make it clear that the Court cannot recognize a payment or adjustment which has not been certified for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act."— *See the Report of the Special Committee.*

O 21 r. 2.

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(2) **Certificate of payment or adjustment of decrees 2200—2224**

(3) **Meaning of the term " to show cause". 2225—2232**

(4) **Uncertified payment or adjustment. 2233—2288**

(5) **Effect of payment to one of several joint decree-holders. 2289—2291**

(6) **Non certification is no bar to a suit for damages 2292—2299**

(7) **Uncertified adjustment may be recognized by other courts than the court executing the decree. 2300—2304**

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(8) **Non—certification is no bar to a criminal prosecution. 2305—2306**

(9) **Limitation of step in aid of execution. 2307—2328**

(10) **Appeal against orders under this section. 2329—2333**

(11) **Miscellaneous Cases. 2334—2337.**

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2 S 206 of 1859 did not apply to decrees under Reg VII of 1799. 2185—2186

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4 Applicability to foreclosure-Decrees. 2188—2189

5 S 258 applies to proceedings in execution of a mortgage 2190—2194

6 Order absolute for sale-Inquiry as to payment. 2195

7 Transfer of decree 2196

8 Inquiry—Satisfaction of decree between judgment-debtor and transferee of decree 2197

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10 S 258 deals and not merely with the adjustment of a money decree-2199

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(8) Non—certification is no bar to [illegible] criminal prosecution. 2305-2306.

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(10) Appeal against order in this section.

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C P C O 21 r 2=1882 S 258. See Execution of decree—Transfer of decree for execution. **31 Mad 517.**

C P C O 21 r 2=S 258 (1882). See C P C S 47. Case No. (683) **14 M L J 359.**

See also Cases under:—

See (1) C P C (1908) S 47=(1882 S 244)=(Act XXIII of 1861 s 11) Questions in Execution Decree.

(2) Limitation Act. 1877, Art, 179 (1871. Art. 167)——Order for Payment at specified dates.

(3) Attachment subjects of attachment.

(1) APPLICABILITY & SCOPE.

(1) Ss. 257A and 258—Difference between.

2184—O 21 r 2—Scope of—Applicability of each section—Difference between them.

S. 257-A, Civ Pro Code 1882, applies only to agreements which suspend, but do not extinguish the right of execution consequent upon the decree and S 258 of the same Code provides, *inter alia*, for such adjustments of the decree, wholly or in part, as do extinguish that right, to the extent contemplated by the adjustment, under the principles of novation.

The agreement made void by S. 257-A is open to rejection by the Court, while that dealt with by S 258 is beyond the power of interference by the Court. (25 Bom 252 (257); 22 Bom 693, not Foll; 6 P C L R 133; 18 All 435; 25 All 17; 1 C P L R 70; 3 C P L R 187; 4 C P L R 41; 16 Cal 504 Ref:)
Sukkanandan v Lakhmichand. 7 N L R 136.

(2) S. 206 of 1859 did not apply to decrees under Reg VII of 1799

2185—C P C O 21 r 2=S 258-Adjustment of decree—Beng Reg VII of 1799, Decree under:—

S 206 of Act VIII of 1859 did not apply to decree under Regulation VII of 1799. **Gopal Chandra Dey v Pemu Bibi. 1 B L R A C 76**

Notes.—Diss 15 Bom 93 Ref: 8 B H C R O 108,

2186—C P C O 21 r 2-(1908)=(1882) S 258—The provisions of section 206 of Act VIII of 1859 only prevent the Court executing the decree from recognising a payment made out of Court and do not bar a suit for the refund of such payment and this view was adopted by the Legislature in section 258 of Act X of 1877. *Quere* whether the said section as amended by Act XII of 1879, requires a contrary view to be taken. **Davlata bin Kaloji Shinde v Ganesh Shatri bin Bala Shastri. P J (1879) 501=4 Bom 295**

Notes—Fol 7 All 124. Ref 5 Mad 397 F B; 10 Bom 155; 11 Bom 6 F B.

(3) Changes of law relating to procedure—Retrospective effect.

2187—C P C O 21 r 2=Civil Procedure Code Sec 258 of 1882—Amending Act. Sec 27.

The change effected in the language of Sec 258 of the Civil Procedure Code by Sec 27 of the Amending Act, by which uncertified adjustments can now be recognised by other Courts then the Courts executing the decree, applies to adjustments previous to the Amending Act. Changes of law relating to procedure have retrospective effect. **Balkrishna Pandharinath v Bapu Yesaji. P J 1894. p 59; 19 Bom 204.**

(4) Applicability to foreclosure—Decrees.

2188—C P C O 21 r 2=S 258 (1882)—Scope of—Execution of decree.

S. 258 cannot be confined in its operation to the adjustment of money-decrees alone. It is applicable to all decrees alike, whether for money or for foreclosure (which was the case in this particular instance) or any other kind of decree.
Lachu v Kishen Lal, 44 P R 1906=82 P L R 1907.

2189—C P C (1908) O 21 r 2=(—S 258, Civ. Pro. Code,1882)—Scope of—Applicability to foreclosure-decrees—Execution of decree.—

S 258 cannot be confined in its operation to the adjustment of money-decrees alone. It is applicable to all decree alike whether for money or for foreclosure (which was the case in this particular instance) or any other kind of decree. (5 Cal 786: 25 Cal 718 Foll; 22 Mad 183 and 25 Mad 412 Diss.) **Lachu v Kishen Lal 44 P R 1906 =82 P L R 1907.**

(1) Applicability & Scope—*Contd.*

(5) S 258 applies to proceeding in execution of a mortgage.

2190-C P C O 21 r 2=(1882 S 258)-T P Act ss 89, 104—Mortgage decree—Execution—Adjustment.

After the order absolute for sale was passed the mortgage agreed upon receipt of certain sums of money to give up his claim for compound interest and to allow a certain remission. *Held* that the Court executing the decree was competent to give effect to the adjustment. (31 Cal 863 ref:) *Quære*—Whether S 258 of the Civil Pro. Code applies to proceedings in execution of a mortgage decree. (4 C W N 474; 8 C W N 103)

Harish Chandra Mondal v Jagaband Dutta.
13 C W N 282=7 C L J 581

2191—C P C (1908) O 21 r 2=(1882) S. 258.

When a payment made by a judgment-debtor to the decree-holder is not certified to the Court, and the time within which the judgment-debtor could have compelled the decree-holder to certify the payment has already expired, the Court of execution cannot recognize the alleged payment.

S. 258 of the Code of 1882 applies to proceedings in execution of mortgage-decrees (3 Ind Cas 374; 10 C L J 467 Fol)

Hari Charan De v Hari Charan Datta Poddar 6 Ind Cas 43.

2192—C P C (1908) O 21 r 2 (=Civ Pro Code 1882 s. 258)-Application for decree absolute for foreclosure—Plea of payment by defendant —No bar to inquiry.

S. 258 does not prohibit an enquiry into the plea of the defendant that the debt has been paid, if it arises in the course of proceedings on an application under s. 87, Transfer of Property Act for an order absolute for foreclosure of the mortgage. (*8 C P L R* 113, 25 Cal 133 Ref.)

Sitaram Amrit Braman v Dharmu
16 C P L R 111.

2193—C P C O 21 r 2=S. 258—Omission to certify satisfaction of decree—Suit to enforce mortgage.

In 1877 M executed a mortgage to S in consideration of a sum paid in cash and a debt due by M to S under a decree. S did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage. *Held*, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiff's right to recover.

Sellamayyan v Muthan 2 Mad 611.

(1) Applicability & Scope—*Contd.*

2194—C P C O 21 rr 2, 10, 21, Ss. 48; 73=(1882 —Ss. 258, 230, 295)—Mortgage decree—Decree for payment of money—Payment out of court.

S. 258, C P C applies to a decree directing the sale of mortgaged property and containing a direction for the recovery personally from the mortgagor and from his other property of what may remain undischarged by the sale proceeds of the mortgaged property. (24 Mad. 421 overruled). S. 258 C P C applies even to a decree which only contains a direction as to sale of mortgaged property. (11 Cal. 718 approved.) A decree for money and a decree for payment of money as used in Ss. 230 and 295, C P C include a mortgage decree directing the sale of mortgaged property. (20 Mad 107 and C M A No. 4 of 1904 Ref: and approved). A receipt by a mortgagee in possession of the usufruct, though 'a payment' within the meaning of S. 22 of the Indian Limitation Act, cannot come within the words 'money payable under a decree' as used in S. 258, C P C.

Vaidhinadasawmy Iyer v Somasundram Pillai 15 M L J 126=28 Mad 473 F B.

Notes:—The controversy on this point does not remain any longer under the new section as the words used therein are "decree of any kind."

(6) Order absolute for sale—Inquiry as to payment,

2195—C P C O 21 r 2=C P C (1882) S. 258.

S. 258. C P C has no application to payments pleaded in bar of a claim for an order absolute for sale under S. 89. T. P. A; and such payments may be inquired into and found even without a recording of satisfaction under that section.

Pramatha Chandra v Khetra Mohan 29 Cal 651.

Notes.—Fol: 10 C L J 91. Ref: 10 C L J 115.

(7) Transfer of decree.

2196—C P C O 21 r 2 (=S. 258)—Assignee's representative applying for execution—

C P C (1908) O 21 r 2=(1882. S. 258) —*Contd.*

(1) Applicability & Scope—*Contd.*

Plea of assignment being intended for the benefit of judgment-debtor—Arrangement not certified—Effect—Scope of O XXI r 2.

Where A applied for execution of a decree which he alleged had been assigned to his father by the original decree holders, and objection was made by B, one of the judgment-debtors, on the ground that the assignment which was in the name of A's father was made under an arrangement that A's father should be a mere *benamidar* for the judgment-debtors.

Held, per Abdur Rahim J., that the arrangement set up amounted to an 'adjustment' referred to in O XXI r 2 and cannot be recognised as it was not certified or recorded as such.

There is no reason why the meaning of the word 'adjustment' should be limited so as to refer only to an adjustment which purports to be one and not to one which has the effect of an adjustment.

Held, also Per Abdur Rahim J that if it cannot be pleaded as an adjustment it cannot be relied on as showing want of title on the part of A.

Per Sundara Aiyar J contra Held that S. 258 (=O XXI r 2) is no bar to proof of a contract that the assignee should obtain a transfer for the benefit of the judgment debtor himself

O XXI r 2 Civ Pro Code does not prevent a party from proving that the assignment of a decree was not intended for the benefit of the assignee himself. The object of the clause is to provide that everything preventing the execution of a decree should be made a record of the Court, so as to give the Court complete control over its decree and execution thereof and it is not part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the Court invalid and the Court will give effect to such adjustments in proceedings other than the execution of the decree. It merely forbids effect being given to adjustments when they are set up as a defence to the execution of the decree by one entitled to do so. (19 Mad 230; 8 Mad 455; 12 C L J 312 and 26 S C 33 Ref.) **Ponnusami Nadar v Latchmanan Chettiar 10 M L T 442.**

C P C (1908) O 21 r 2=(1882, S.258) —*Contd.*

(1) Applicability & Scope—*Contd.*

(8) Inquiry—Satisfaction of decree between judgment-debtor and transferee of decree.

2197—C P C O 21 r 2=S. 258 of 1882.

On an application for execution of a decree being presented by a transferee decree-holder, the judgment—debtor opposed, alleging in his petition that he had transferred certain immoveable property to the petitioner in consideration of his paying the judgment-debt to the original decree-holder and that the petitioner had discharged the debt, but subsequently, having got the decree transferred to himself instead of entering up satisfaction of the decree, fraudulently applied for execution. Satisfaction had not been entered up under s. 258, Civil Procedure Code. *Held* that s. 258 Civil Procedure Code, was inapplicable to the case since that section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction. **Rama Ayyan v Sreenivasa Pattar 19 Mad 230.**

Notes:—Dist: 21 Mad 409.

(9) Fraud of creditors—Assignment—Payment by judgment-debtor—Effect of.

2198—C P C O 21 rr. 2, 16—Applicability—

Order XXI, R. 2, is not applicable to [illegible] of a judgment-debtor who with a view to defraud his other creditors has, with the assistance of the decree-holder, obtained an assignment of the decree for his own benefit in the name of a near relative, so that he may use it as a shield for his own protection. The question whether the assignee of the decree who makes the application under O. XXI, Rule 16, is to be treated as the purchaser of an enforceable right even if it is established that the decree which he professed to levy has been satisfied in full by the judgment-debtor, and whether if the assignee is in reality no other than the judgment-debtor himself he can execute the decree against the purchaser of the equity of redemption are questions within the scope of S.47 and beyond the scope of O. 21, r 2. If the assignor has no title to the judgment he can convey none to the assignee, and where a judgment, once paid though not satisfied of record is assigned by the judgment-creditor, the assignee takes it subject to all defences and equities which were available

C P C (1908) O 21 r 2=(1882, S 258) -*Contd.*

(1) Applicability & Scope—*Contd.*

to the judgment-debtor against the assignor. (26 S. C. 33 I A. 19 ref. to.) The payment of a judgment by one primarily liable to pay the same, is an absolute satisfaction, and the assignment of judgment to him or to another for him will not prevent its execution. (1899) 152 Ind. 553, 53. N. E 839 ref.to.- **Monmohan Karmokar v Dwarka Nath Karmokar.** **1910. 12 C L J 312.**

(10) S. 258 deals and not merely with the adjustment of a money decree.

2199—C P C O 21 r 2 = S 258-Civil Procedure Code Act X of 1877, Secs 244 and 258—Adjustment of Decree-Execution Proceedings.

Section 258 of the Civil Procedure Code Act X of 1877 does not apply to money decrees only,-but deals with the adjustment of any decree.

Baba Mahomed v Webb. **6 Cal 786 =8 C L R 36.**

Notes:—Dist: 22 Mad 182.

2 CERTIFICATE OF PAYMENT OR ADJUSTMENT OF DECREE.

(1) To certify a payment is to certify that money has been paid.

2200—C P C O. 21. r. 2=S. 258 of 1882.

To certify a payment or an adjustment, within the meaning of S. 258, it is sufficient for the decree-holder to certify that money has been paid or that an adjustment has been arrived at without specifying the amount of the payment or mentioning the terms of the adjustment. **Tulsigiriyappa v Fakirayya** **2 Bom L R 901.**

(2) Satisfaction fraudulently made to defeat creditors.

2201-C P C O 21 r 2=(1882 S 258)-Satisfaction certified-Attachment by a creditor of decree-holder alleging that satisfaction was fraudulently made to defeat creditors—Right to set up such a case,

Where a decree-holder for whatever reason forgives his judgment-debtor and certified satisfaction without receiving payment, held that it was not open to creditor trying to attach the decree so satisfied to prove that satisfaction was fraudulently made to defeat his rights. **Subba Pillai v Alliar Rowther.** **5 M L T 72= 2 Ind Cas 523.**

C P C (1908) O 21 r 2=(1882, S. 258) -*Contd.*

(2) Certificate of payment or adjustment of decree-*Contd.*

(3) Application recording satisfaction.

2202—C P C O 21 r 2=(Civ. Pro.Code, 1882, s. 258)—Execution of decree—Application by decree-holder for recording satisfaction.

In the proceedings for execution taken by the respondent, the appellant made an application, informing the Court of a payment which had just been made in satisfaction. *Held*, that the application should not have been refused consideration, merely because the applicant did not, in express words, ask that notice to the respondent should issue and a formal notice had not been served. The lower Court should determine on the merits whether the payment had been made. **Khushal Singh v Midai Lal.** **A W N 1881, 168.**

2203—C P C (1908) O 21 rr 2, 53 (=Civ. Pro. Code. Act XIV of 1882, ss. 258 and 273)—Attachment of decree in favour of judgment-debtor after latter's death—Right of holder of attached decree to enter satisfaction of payment made before attachment—Procedure—Effect of attachment of decree on status of decree-holder—Decree for mesnè profits—Liability of decree to attachment in execution of another decree.

Where a decree is attached in execution of a money decree, there is nothing to prevent the holder of the attached decree to enter satisfaction of his decree after the attachment if the payment or adjustment had been made bona fide before the attachment. On the death of the judgment-debtor, the decree-holder can attach a decree in favour of the judgment-debtor, provided his legal representatives have been brought on record. An attachment under s. 273 of the Code does not determine the status of the prior execution-creditor as such. It only suspends his right for the limited purpose of enabling his judgment-creditor to obtain satisfaction. A decree for mesne profits reserved to be ascertained in execution is a decree for money and can be attached under the provisions of s. 273 of the Code in execution of another decree. **Ramaswami Aiyar v Rama Aiyar** **2 M L J 288.**

C P C (1908) O 21 r 2=(1882 S. 258) —*Contd.*

(2) Certificate of payment or adjustment of decrees—*Contd.*

(4) Suit to enforce.

2204—C P C O 21 r 2=S. 258-Adjustment under contract.

A suit to enforce a contract by which a dispute was adjusted between a decree-holder and judgment-debtor is not barred by Act VIII of 1859, s. 206. **Nujeem Mullick v Erfan Mollah. 24 W R 298.**

Notes.—Ap; 7 All 124. Dist: 21 Cal 137. Ref: 2 M L J 221; 5 M L J 140; 11 Bom 6 F B.

(5) Manager certifying payment of a decree.

2205—C P C O 21 r 2=S. 258—Manager of a joint Hindu family certifying payment of a decree in favour of himself and minor members—Security, power to demand, from manager—Civ. P. C. of 1882, S. 258.-A person acting for himself and as guardian of the minor members of his family obtained a decree in satisfaction of which he obtained bonds in favour of herself alone and applied under S. 258 C P C to have the adjustment certified. The lower Court directed him to file security on the ground that some of the decree-holders were minors.

Held, that as he was avowedly acting as managing member of a joint Hindu family, no security could be damanded from him. (12 C W N 598 Ref.)

Monohar Lal v Sheo Singh 11 O C 246.

(6) Payment by surety—Adjustment out of Court.

2206—C P C O 21, r 2—Virtually certified to Court under s. 206, Act VIII of 1859.

A judgment-creditor gave a receipt to a surety, stating that the matter was settled as far as the surety was concerned. He then applied for execution of the decree against the surety for the full amount, stating that the receipt was given by him under duress, and that as the adjustment was made out of Court he should still be allowed to execute decree against surety. *Held* that the adjustment was virtually certified to the Court under s. 206, Act VIII of 1859.

Bhowani Dass v Kishen Chund 32 P R 1871.

C P C (1908) O 21 r. 2=(1882, S.258) —*Contd.*

(2) Certificate of payment or adjustment of decrees—*Contd.*

(7) Judgment-debtor, part purchaser of a decree, suit by.

2207—C P C O 21 r 2=S. 258—Some of the decree-holders sold their share of the decree to some of the judgment-debtors.

The remaining decree-holders gave security as required by s. 231 and obtained the execution of the whole of the decree notwithstanding the objection of the judgment-debtors, the purchasers of the part of a decree on the ground of their purchase. Therefore the purchasers of the part of a decree brought a suit for the recovery of the proportionate amount of the sale-proceeds. *Held* the plaintiffs were entitled to the relief sought for. *Held* that s. 258 did not affect the suit brought, not upon the allegation that the decrees were satisfied by the plaintiff's purchase but on the contrary was founded upon the allegation that the decrees were not so satisfied. (11 Bom 6 referred to.). *Held* further that the claim was not within the words relating to the execution of the decree, in s. 244 inasmuch as it did not raise any question in respect to the furtherance of or hindrance to, or the manner of carrying out the execution of the decrees. **Haragobind Das Kolbarto v Issuri Dasi. 15 Cal 187.**

Notes —Ref: 2 M L J 14.

(8) Necessity to be certified-Compromise.

2208-C P C O 21 r 2=(1882 sec 258)-Adjustment in part of decree.

Where there is a money decree against two defendants, an agreement discharging one of them, is an adjustment in part of the decree and so requires to be certified. (22 Bom 463 Expl; 15 M L J 370, Ref.) **Mahomed Khan Bahadur v Mahomed Munawar Sahib. 4 M L T 229=18 M L J 542=31 Mad 467.**

(9) Compromise by next friend or guardian.

2209-C P C O 21 r 2; O 32 r 7=Ss 258 & 462—Agreement entered into in proceedings in suit subsequent to decree—Foreclosure, Suit for—Compromise entered into by next friend or guardian for the suit of a minor, without leave of the Court—Civil Procedure Code, ss. 258 and 462.

(2) Certificate of payment or adjustment of decrees—*Contd.*

In a suit for foreclosure of a mortgage, the appellant who was a minor at the time, and the respondent No 3 who was his guardian for the suit were defendants. In September 1883, a foreclosure decree was passed in favour of the plaintiff. Before the date fixed by the decree for the payment of the mortgage-money, the respondent No 3 and the plaintiff presented a petition to the Court, which passed the decree, in which they stated that the mortgagee had agreed that the mortgagors should hold certain land, part of the mortgaged property rent-free, and that the mortgagors had agreed not to redeem the mortgage; and they prayed that an order absolute for foreclosure might be made at once. This petition purported to have been presented under s. 25 , Civil Procedure Code. The Court made an order embodying the terms of the agreement, and declaring that the order had the force of a decree under s. 87, Transfer of Property Act, and s. 375 Civil Procedure Code. The mortgagee obtained possession of the mortgaged property: The appellant in 1897 brought a suit against the respondents, claiming to have the agreement above-mentioned set aside, and to recover possession of the mortgaged property on the ground that the agreement was fraudulent, and had been made without the leave of the Court. *Held*, that a compromise entered into by the next friend or guardian for the suit of a minor, without the leave of the Court, is voidable at the instance of the minor on that ground alone, notwithstanding the decree made upon such compromise may have become final, and that no attempt is made to show that it was disadvantageous to him. *Held*, that the provisions of s 462, Civil Procedure Code, are applicable to agreements entered into in proceedings in a suit subsequent to the decree, even if the agreement adjusted the decree for foreclosure within the meaning of s. 258, Civil Procedure Code. **Mukund Singh v Reoti.**
2 O C 45.

(10) Voluntary adjustments.

2210—C P C O 21 r 2=S. 258 of 1882.

Where a judgment-debtor pays the amount decreed to the officer of the Court under the authority and pressure of the Court's process, he is entitled to protection; the latter clause of s. 206, Act VIII of 1859, relating not to such payments,

(9) Certificate of payment or adjustment of decrees—*Contd.*

but to voluntary adjustment. **Bidhoo Beebee v Keshub Chunder.**
9 W R 462.

Notes—Ref: 28 Bom 264.

(11) Adjustment certified to Court.

2211—C P C O. 21, rr. 2, 1=(1882) Ss. 258 & 257 Act VIII of 1859, Section 206.

Kishen Chund was liable as surety for the payment of the amount of a certain money decree. The judgment-creditor gave Kishen Chund out of Court a receipt for Rupees 1,150, stating in the receipt that the matter was settled as far as Kishen Chund was concerned. Subsequently the judgment-creditor applied for execution against Kishen Chund for the full amount of the decree, Rs. 1350. Kishen Chund produced the receipt in Court with a view to stay execution, and the judgment-creditor, on being questioned, admitted that he had signed the receipt, but urged that he had done so because Kishen Chund threatened to become bankrupt. The Court disallowed execution against Kishen Chund. On appeal the judgment-creditor again contended that the receipt was given under duress, and further, that as the adjustment was made out of Court, he should still be allowed to execute the decree against Kishen Chund. *Held*, that the adjustment was virtually certified to the Court under Section 206, and that the order of the Lower Court was correct.

Bhowani Dass v Kishen Chund.
P R 32 of 1871.

(12) Adjustment out of Court-Compromise.

2212—C P C O 21 r 2=S. 258 of 1882.

H sued *B* to recover possession of a certain house. *B* answered that the house was his own: that *H* having fraudulently got possession of it, he (*B*) had filed a suit to recover possession; that a decree was passed in his favour in the lower Court, which, however, was reversed on appeal; that, pending a special appeal, a compromise had been entered into between him and *H*, in pursuance of which he (*B*) was put in possession of the house. The terms of this compromise were not certified to the Court under s. 206 of the Civil Procedure Code *Held* that this compromise having been effected after the decree in favour of

C P C (1908) O 21 r 2=(1882, S.258) —Contd.

(2) Certificate of payment or adjustment of decrees—*Contd.*

B had been reversed, did not come within the meaning of s. 206, and was, therefore, a good defence to the suit of *H.* **Hari Sadashiv Dikshit v Bapu Bulvant.** **[illegible] Bom H C A C 78.**

(13) Compromise of suit—Decree to be passed in accordance.

2213—C P C O 21, r 2, O 23, r 3=(Civ Pro Code, 1882, ss. 258, 375)—Certificate of adjustment of decree by decree-holder.

The provision of law contained in s. 258, cannot be evaded by the device of moving for an enquiry under s. 244, namely, to find out whether the decree had been satisfied or not, and if the Court found that the decree had been satisfied, to cancel the execution of it. In carrying out the provisions of s. 375, Civ Pro Code, the Court should ascertain the terms of the agreement and draw up the decree in accordance with it.

Munshi Ram v Dera Mul.
U B R 1897–1901 Vol II 256.

2214—C P C O 21, r 2=S. 258 of 1882.

Parties to the suit asked the Court passing this decree to treat the mortgage deed as an adjustment and the Court assented.

Held, that the adjustment fell within S. 258.
Hemchand v Madhav. 1889 P J 33.

(14) Sufficiency of certificate of payment.

2215—C P C O 21 r 2=S. 258—Adjustment out of Court.

A petition signed and filed in Court by a judgment-creditor certifying payment of the amount due to him by his judgment-debtor is a sufficient certificate of payment under the decree in the terms of s. 206, Code of Civil Procedure.

Saadoollah Shaikh v Kaleechurn.
12 W R 358.

(15) Injunction to restrain execution after agreement out of Court.

2216—C P C O 21 r 2=S. 258 of 1882.

Where a decree-holder agrees for a good consideration not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an injunction against the former not to do what he has agreed not to do, Act VIII of 1859, s. 206, notwithstanding. **Nubo Kishen Mookerjee v Debnath Roy Chowdhry.**
22 W R 194.

Notes—Ap: 7 All 124. Dist: 21 Cal 437; 6 C W N 796. Ref: 11 Bom 6 F B; 17 Bom 23; 31 Cal 480; 8 C W N 395.

(16) Duty of execution-creditor.

2217—C P C O 21 r 2=S. 258 of 1882 Adjustment out of Court—Presumption.

A, an execution-creditor of *C*, applied to the Court by which the decree was passed, and caused *C* to be imprisoned under it. *C* then entered into a compromise upon certain terms with *A* for the adjustment of the decree, and *K* thereupon, but without certifying the terms of such adjustment to the Court, petitioned for the release of *C*, who was accordingly released. Subsequently *K* again applied to the Court to compel satisfaction of the whole amount of the decree against *C*. This application was opposed by *C* on the ground that an adjustment of the decree had taken place between him and *K*. The Judge, however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court under s. 206 of the Civil Procedure Court. *Held* that the Judge was in error; that it was the duty of *K*, on applying for the release of *C*, to certify the adjustment to the Court; that it would be unjust to allow him to take advantage of his own omission to do so; and that, not having done so, the presumption against him was that the decree had been satisfied in full; but that, under the circumstances, it would be the most equitable course to direct the Judge to enquire into the terms of the adjustment. Case remanded for that purpose. **Chango Valad Duvha Mahajan v Kaluram Narayandas.**
4 Bom H C R A C 120.

Notes—Ref: 4 Bom 594.

(17) Kistbundi—Execution of decree

2218.—C P C O 21 r 2=S 258 of 1882.

Where a decree had been obtained for a certain sum of money without interest and after-

CPC (1908) O 21 r 2=(1882, S. 258) -Contd.

(2) Certificate of payment or adjustment of decrees—Contd.

wards a kistbundi was filed, by which the decree-holder and the judgment-debtor agreed that the amount of the decree should be paid by instalments with interest, and the judgment-debtor had by his conduct for several years, treated the kistbundi as if it were a decree,—*Held* that under the circumstances of the case, the judgment-debtor could not afterwards object that the kistbundi could not be executed as a decree, and that a fresh suit should be brought upon the kistbundi; but the decree-holder was entitled to take proceedings on the kistbundi as if it were part of the original decree. **Dinonath Sen v Guru-churn Pal.** **14 B L R 287: 21 W R 310.**
Jankee v. Sreenath Roy Chowdhry **5 W R Mis 19.**

2219.—C P C O 21 r 2=s 258 of 1882 Kistbundi Instalment-petition-Execution of decree.—

In execution proceedings between the parties to a decree a petition was presented by both the sides to the munsif stating therein that they had arranged among themselves that the amount decreed was to be paid by instalments & in default of payment "the Court may on the application of the plaintiff issue a warrant and collect the amount with costs of the petition from the product of my share of the agraharam lands...... which are held liable by the Razinama decree of this suit.........and pay the same to the plaintiff" The conclusive portion of the petition ran thus, "We both the parties present this postpone—petition with our free will and consent and pray for its being enforced according to its terms". On this postpone—petition the plaintiff filed a suit to recover money in the Munsif's court– *Held* on special appeal by the full-bench who affirmed the decree of both the lower Courts that the suit on the petition was not maintainable because it was clear that the parties had not the intention to create new right from this petition in supersession of those that existed from the decree. **Darbha Venkamma v. Rama Subbarayadu.** **I Mad 387.**
See Debi Rai v Gokul Prasad. **3 All 585.**
and Ganga v. Murlidhar **4 All 240.**

Notes.—Foll 4 All 240.

2220.—C P C O 21 r 2=s. 258—Agreement between parties for payment of decree by instalments—Subsequent application for execution.—

C P C (1908) O 21 r 2=(1882, S.258) -Contd.

(2) Certificate of payment or adjustment of decrees—Contd.

C obtained a decree against *N* for payment of a certain sum of money. Various applications were made to execute the decree, and on one of them, in September 1869, the sum of Rs 1,000 was paid. Subsequently, on December 16th, 1870 it was arranged, upon a petition of N and the consent of *A*, that a further payment of Rs 1,000 should be made, and that the balance of the debt should be paid with interest at the rate of 1 per cent. per month by monthly instalments of Rs 125 In May 1873, C applied for execution for recovery of the balance due on the decree, deducting the amount received under the arrangement. *Held* he was not entitled to execution in supersession of the agreement. **Chunder Nath Misser v. Gource Komul Bhuttacharjee.** **10 B L R Ap 28: 19 W R 155.**

Notes:—See 32 Bom 184.

2221.—C P C O 21 r 2 = S 258—Agreement to pay by instalments—Enforcing kistbundi or instalment-bond by execution.—

An agreement between the parties to a decree to reduce its amount or to give time for his payment, or that the amount shall be paid by instalments, does not amount to a varying of the decree itself. A having obtained against B a decree for the payment of money, a kistbundi was inserted in the decree, by which it was arranged that the amount of the decree should be paid by instalments of Rs [illegible],000. A considerable remission was allowed to the judgment-debtor, and some reduction was made in the amount of interest payable The kistbundi contained an express proviso that in default of payment of three consecutive kists, the whole amount due under the bond was to become at once realizable; and it also provided that in case of default the amounts due were to be recovered by execution, to which the judgment-debtor was to make no objection. Certain instalments having fallen due, the judgment-creditor sought to enforce the kistbundi by execution *Held* that he was entitled to do so; that he was not bound to bring a regular suit; and that a provision in the bond by which payment

(2) Certificate of payment or adjustment of decrees—*Contd.*

might be enforced against property which could not have been attached and sold in execution of the decree did not prevent the decree-holder from proceeding by execution so long as he did not seek to enforce that provision. Ameerunnissa Khatoon v. Meer Mahomed Hossein 2 C L R 143.

Notes:—Ref: 19 All 186.

(18) Purchase for sale of portion of mortgaged property—Right of mortgagor to redeem.

2222.—C P C O 21 r 2 = S 258—Purchase **by mortgagee holding decree for sale of portion of mortgaged property, subject to mortgage.—**

A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money-decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under s 258 of the Code of Civil Procedure, claiming that the mortgagee was bound to discharge his mortgage debt and should be called upon to certify satisfaction of his decree. *Held* that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner, together with the remainder of the property. *Quære*—Whether the subject-matter of the petition was an "adjustment" of the decree within the meaning of s 258 of the Code of Civil Procedure? Erusappa Mudaliar v. Commercial and Land Mortgage Bank 23 Mad 377.

Notes.—Disap: 24 Mad 96; 12 M L J 390. Over: 27 Mad 428. Ref: 17 M L J 163: 6 O L J 320 F B; 11 O W N 1011 F B; 30 Mad 313; 35 Cal 61 F B.

(19) Sanction of Court as to agreements relating to judgment-debt

2223—C P C O 21 rr 2, 1=(1882 Ss 258, and 257)—**Agreement for payment of judgment-debt—Judgment-debt, payment of, to decree-holder.**

(2) Certificate of payment or adjustment of decrees—*Concld.*

Held—On a construction of a bond that the agreement in the bond not being one for the satisfaction of the judgment-debt and providing for the payment, directly or indirectly, of any sum in excess of the sum due under the decree. It was an agreement for the payment of the amount by which the judgment-debt was satisfied with interest on that amount. *Held* therefore, that the suit was rightly decreed. (18 All 479 and 3 O C 165, dissented from.) **Mirza Mohammad Zakir v. Girdhari Lal. 4 O C 284.**

(20) Payment without notice.

2224-C P C O 21 rr 2. 1=(1882) ss. 258 & 257 Act VIII of 1859. Sections 208, 206.—

A and B obtaind a joint decree against C, in which A's interest was Rs 2,787-2-7 and B's Rs 471. *A* assigned his interest in the decree to B, and under Section 208, Civil Procedure Code, the Court ordered execution against C in favour of B solely. Subsequently *A* petitioned the Court to cancel the assignment, and allow him (*A*) to be again recognized as one of the decree-holders; the Court assented, and passed an order accordingly. B obtained an injunction to restrain C from paying A, and also appealed from the order cancelling the assignment. This order was reversed on appeal, the decree being held to be B's solely, but in the meantime, and before the injunction was served on C, *A* received the amount of the decree from C. *Held*, that B could not execute the decree against C. **Bertola v. Jeewun Ram P R 29 of 1871.**

MEANING OF THE TERM "TO SHOW CAUSE"

(1) Decree-holder to show Cause.

2225—C P C O 21 r 2 (=Civ. Pro. Code s. 258)—Execution of decree—Alleged payment out of Court—

The appellants, judgment-debtors, alleging that they had made a payment in part-satisfaction of the amount due under the decree which the decree-holder would not certify applied to the Court executing the decree that "proceedings might be taken under s 258 of the Civ.pro. Code." Notice was accordingly sent to the judgment-

C P C (1908) O 21 r 2=(1882, S. 258) -Contd.

(3) Meaning of the term "to show cause"—*Contd.*

creditor who, however, denied having received any money. *Held* that the mere denial of the decree-holder that payment has been made is not sufficient cause to refuse certification of payment. The decree-holder must satisfy the Court of the truth of his statement, and show that there are grounds for believing that no payment has been made. The question should be decided on evidence adduced by the parties. **Arjan Singh v Harcharan Singh, A W [illegible] 1884. 40.**

(2) Certifying part payment of decree.

2226- C P C O 21 r 3=S 258—Meaning of "to show cause"—

The court must investigate and decide any questions of fact upon which the parties may not be agreed before it is satisfied as to the sufficiency or otherwise of the cause shown by the defendant under s 258 C P Code. Evidence may be either oral or by affidavits to show cause does not mean merely to allege causes, nor to make out that there is room for argument but it means both to allege cause and to prove it to the satisfaction of the Court. **Rung Lall v Hem Narain Gir. 11 Cal 166.**

Netes—Ref: 21 Cal 213 F B.

(3) Judgment—debtor's right to apply for certifying payment.

2227.—C P C O 21 r 2=(1882—S. 258, para. 2)—Payment out of Court.

A judgment-debtor who has discharged the decree by payment out of Court may at once apply to the Court to enter up satisfaction of the decree and is not bound to wait and see whether or not the decree-holder would himself certify statisfaction to the Court. **Valambal v. Logambal Ammal. 12 M L J 94.**

(4) Execution of decree.

2228.—C P C O 21 rr 2, 1=C P C (1882) ss. 258, 257.

Where on an application by a judgment-debtor under s. 258 of the Code of Civil Procedure that an alleged payment out of Court under the decree might be recorded as certified, the decree-holder denied that such payment had

C P C (1908) O 21 r 2=(1882, S.258) -Contd.

(3) Meaning of the term "to show cause"—*Contd.*

been made. *Held* that the Court had acted rightly in taking evidence on the point and deciding it on such evidence, instead of leaving the judgment—debtor to bring a suit. **Tika Ram v Ram Chand. 8 W N 82.**

(5) Judgment-debtors had a right to the remedy provided.

2229—C P C O 21 r 2=S. 258-Contract Act S. 63.

Where under S.258 the judgment-debtor made the decree-holder bring into Court the document relied on by the former as an adjustment of the decree and the District Judge treated it as an agreement without consideration and therefore not a contract, *held* that the District Judge had failed to take notice of S. 63 of the Indian Contract Act, and illustration (b) and that the judgment-debtors had a right if there had been an adjustment to the satisfaction of the decree-holder, to the remedy provided by S. 258. **Ganapaya v Ramkrishna. 1896 P J 192.**

(6) Decree-holder to show cause against.

2230.-C P C O 21 rr 2, 1=C P C ss. 258 257 (1882.)

A decree holder applied for execution of his decree on the 1st May 1881. Notice on the judgment-debtor was served on the 27th May, 1881. On the 16th June, 1881, the judgment-debtor informed the Court executing the decree by petition, that he had paid Rs. 100 to the decree-holder on the 5th December, 1878, and the balance of the decretal amount on the 30th May, 1881. The Court of first instance disallowed the payment of Rs. 100 as such payment had not been certified to the Court; but treated the application of the 16th June, 1881 as one made under s. 258 Code of Civil Procedure, and admissible in respect of the payment made on the 30th May, 1881, being within the term of limitation. It accordingly gave decree-holder opportunity to show cause against such payment and holding that such payment had been made ordered that it should be recorded that the decree had been fully satisfied. The lower appellate Court reversed the order on the ground that there had not been proper compliance with the provisions of s. 258 inasmuch as the judg-

C P C (1908) O 21 r 2 1882, S.258) —*Contd.*

(3) Meaning of the term "to show cause"—*Contd.*

ment-debtor had not asked for the issue of notice to the decree-holder to show cause why the payment should not be recorded, as certified, and no notice of the kind, was served. *Held* that the lower appellate Court was in error and the first Court was right in treating the application as one made under s. 258 and calling upon the decree-holder to show cause against it. **Khushal Singh v Midai Lal. 1 W N 168.**

(7) Application to certify—What is.

2231.—C P C O 21 r 2 = C P C s. 258 of 1882.

Where a judgment-debtor pleads payment to the decree-holder out of Court by way of objection to an application for execution of the decree such objection cannot, strictly speaking, be considered as a proceeding in conformity with the second paragraph of s. 258 of the Code of Civil Procedure. In order to establish the fact of payment, or adjustment out of Court under the provisions of the above named section, the judgment-debtor ought of his own motion to move the Court to call upon the decree-holder to show why such payment or adjustment made should not be certified. **Radha v Bechu Ram. 11 W N 11**

(8) Adjustment made out of Court—Payment into Court.

2232.—C P C O 21 r 2 = S. 258 of 1882.

Under the Civil Procedure Code s. 306 a debtor under a money-decree can at any time bring the amount of his debt into Court to be paid to the judgment-creditor, and by analogy any other person against whom a decree is made for the delivery of moveable or immoveable property has an equal right to relieve himself from further vexation by making satisfaction with the knowledge of the Court in such mode as the circumstances of the special case admit of. By the same section all adjustments of decrees, whatever be the nature of the subject of those decrees must be made with the knowledge of the Court. *Quære* (by Markby J)-Where a party simply acts in obedience to a decree is he debarred from showing that he has done so by the words "no adjustment of a decree, in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court, or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred? **Raj Luckhee Chowdhrain v Tewaree Chowdhry. 18 W R 520.**

C P C (1908) O 21 r 2 = (1882 S.258) —*Contd.*

(3) Meaning of the term "to show cause"—*Concld.*

4 UNCERTIFIED PAYMENT OR ADJUSTMENT.

(1) Estoppel.

2233.—C P C O 21 r 2 sub-r. (3)-Adjustment of decree.

An arrangement made by a judgment-debtor with a decree-holder to the effect that, if the former make two defaults in the payment of instalment decree, the decree-holder should not thereby be entitled as he otherwise would have been entitled by the decree, to realise the whole balance of money, but should only be entitled to sell certain estate and should then be debarred from proceeding with the execution of his decree until further default had been made, was an adjustment within the meaning of O XXI r 2 of the Code, and required to be certified to the Court.

Semble:—A mere agreement to grant time is an adjustment within the meaning of O XXI, r 2 of the Code.

Sub-rule 3 of O XXI of the Code is applicable even in the case where the decree-holder is guilty of fraud.

There can be no estoppel against the precise terms of the provision of the Code. **Cham Lal Chatterjee v Hazarimal Babu. 15 C L J 451 = 13 Ind Cas 326.**

2234.—C P C (1908) O 21 r 2—Adjustment. Where an adjustment alleged by a judgment debtor has not been certified under cl. (1) or (2) of O XXI r 2 of the Code, the Court is expressly prohibited by cl (3) from recognising it. The Court should treat the written statement of the judgment-debtor alleging adjustment as an application under r. 2 cl 2 and dispose of it according to law. **U Po Thaing v Maung Bau. 11 Ind Cas 780 = 4 Bur L T 162.**

C P C (1908) O 21 r. 2=(1882, S. 258 -Contd.

(4) Uncertified payment or adjustment —Contd.

(2) S. 258. application under—Evidence.

2235.—C P C O 21 r 2 = (s. 258 Civ Pro Code 1882)—Execution of decree.

Where an application by a judgment-debtor under s. 258 Civ Pro Code was presented alleging payment out of Court, and the decree holder denied it, held that the Court had acted rightly in going into evidence and deciding the point though it was open to the judgment-debtor to bring a suit. **Tika Ram v Ram Chand, 1888. A W N 82.**

2236.—C P C O 21 r 2=S. 258—Part payments not certified to Court.—

Quære Whether part payments under a decree may not be proved, although they have not been made through the Court, or certified to the Court under s. 206 of Act VIII of 1859

Bhuboneswari Debi v Dinanath Sandyal. 2 B L R A C 320=11 W R 233.

2237—C P C O 21 r 2=S. 258 of 1882—Adjustment of decree not certified — Proof of the payment—Fraudulent execution of decree after payment.—

A decree was satisfied out of Court but the payment was not recorded under S.258 C P Code. The judgment-debtor sued to have the sale, made after the satisfaction of the decree, set aside. The judgment-debtor might prove the payment of the decretal amount otherwise than by a certificate.

Pat Dasi v. Sharup Chand Mala, 14 Cal 376.

Mothura Mohun Ghose Mondul v Akkoy Kumar Mitter, 15 Cal 557.

Notes:—Not Fol: 20 All 254 Fol: 13 All 339. Con: 15 Cal 557; 21 Cal 437. Ref: 13 C W N 710.

(3) Adjustment not certified—Plea in bar of execution.

2238.—C P C O 21 r 2 =(1882—S. 258.)

An adjustment of a decree out of Court by an agreement to accept a small sum in full satisfaction of decree, cannot, unless certified under S. 258, C P C be pleaded as a bar to the execution of the decree as to the balance. (21 Mad 409; 29 Mad 312 foll. 21 Mad 356 not foll.) **Veerappa Chettiar v Arumugam Poosari. 17 M L J 527.**

C P C (1908 O 21 r 2=(1882 S. 258) -Contd.

(4) Uncertified payment or adjustment —Contd.

Notes.—Ref 12 C L J 312=7 Ind Cas 55.

2239.—C P C O 21 r 2=(1882 s. 258)-Uncertified adjustment—Executing Courts, of.

Where the judgment-debtors pleaded in bar of an application for execution in respect of the portion of the decree granting mesne profits and costs, an uncertified adjustment between the parties whereby the decree-holder was alleged to have agreed to sell the suit lands in consideration of his taking a mortgage of the same from the judgment-debtors for the amount decreed for mesne profits and costs and the value of the lands.—*Held*, that s. 258 was a bar to such a plea. **Seetharama Aiyar v Chinna Chenga Reddy. 16 M L J 33=29 Mad 312.**

2240—C P C O 21 r. 2=S. 258—Uncertified payment of part of decretal amount—Plea of limitation raised by judgment-debtor.

S. 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. (4 B L R F. B. 130, 11 Bom 506; 4 All 316: 7 All 337 and 21 Cal 542 referred to.)

Kishan Singh v Aman Singh. 17 All 42.

Notes:—Fol: 36 All 36.

2241—C P C O 21, r. 2= S. 258 of 1882.

On the 3rd January, 1886, a judgment-debtor executed in favour of the decree-holder a bond purporting to liquidate the entire amount due under the decree. No proceedings were taken by either party for certification of the adjustment under s. 258 of the Code of Civil Procedure. In defence to a subsequent application for execution the judgment-debtor pleaded that the decree had been satisfied by execution of the bond. In reply the decree-holder by a petition, dated the 12th June, 1886, admitted acceptance of the bond as part-satisfaction only of the decree. *Held* that the last paragraph of s 258 of the Code did not preclude the Court from considering to what extent the decree had been adjusted by execution of the bond; that the decree-holder's petition of the 18th June, 1886, was a sufficient certification under s. 258; and that Art. 161 of the second schedule of the Limitation Act did not bar certification, inasmuch as that article did not apply where the decree-holder took steps *suo motu*. **Gopal Das v Ganga Ram.** [illegible] W N 115.

(4) Payment not certified to Court—Execution to be refused.

2242-C P C O 21 [illegible] (=Civ. Pro. Code, 1882 s. 258)—Execution-Application by assignee-Plea of payment to original decree-holder—Execution not to be refused.

A Court cannot refuse to execute a decree assigned by the orginal decree-holder on the ground that it has been satisfied by a payment to the original decree-holder, where such payment has not been certified to the Court. **Deoji and Brij Lall v Ranchordass** 4 C P L R 132.

(5) Payment out of court-Recognition by Court without certifying.

2243—C P C O 21 r. 2= (Act XIV of 1882, section 258).

If money due under a mortgage decree under section 88 of the Transfer of Property Act is paid out of Court and neither party takes steps to have it certified under section 258 of the Code of Civil Procedure the Court executing the decree is precluded from recognising the alleged payment out of Court (28 Mad. 473 Foll. 8 C W N 103 dissented from. 13 All 278; 25 Mad 244 Ref; 24 Mad 412 Fol.) **Hakim Singh v Ram Singh 5 A L J 272=1908 A W N 103=30 All 248.**

2244—C P C O 21 rr 2,1=C P C(1882) ss 258 &257 Civil Procedure Code=(Act VIII of 1859) Section 206—Payments in satisfaction of, decree made out of Court, but not certified to the Court.

D. obtained a decree against K. and S. A. for possession of certain mortgage land, subject to the condition that K. and S. A. were to continue in cultivation thereof for three years, paying D, the proprietor's share of the produce, out of which D was to pay the Government revenue, and apply surplus (if any) to paying off the principal debt and in the event of the principal debt not being paid off, D was to obtain cultivating possession. At the end of three years, D applied for possession under the decree, alleging non-receipt of any payments under it, while K. and S. A. alleged payment in full satisfaction of the principal debt. *Held*, that the Court executing the decree was precluded by Section 206, Act VIII of 1859 from recognizing the payments alleged to have been made out of Court, and which were not certified to the Court.

Semble, that even if it was intended that the payments under the decree obtained by D. should be made out of Court, K. and S. A. were not relieved from the duty of seeing that such payments were certified to the Court by D. **Dulla v Karm.** **P R 26 of 1878.**

2245—C P C O 21 r 2=S. 258—Adjustment out of Court.

Where several of the acts required to be done in execution of a decree are such as can be done through a Court, and where all of them are acts the doing of which may be certified to the Court by the person in whose favour the decree was made, the policy of s. 206 of the Code of Civil Procedure is to exclude the reception of evidence upon the point, or any question arising out of evidence before the Court. No adjustment can be recognized unless made through the Court or certified by the person in whose favour the decree was made. **Dwarkanath Dass Biswas v Unnodachurn Dass.** **8 W R 319.**

2246—C P C O 21 r 2=S. 258 Adjustment or satisfaction of decree—Civil Procedure Code—Amendment Act (VII of 1888), s. 27—Recognition of adjustment by a Civil Court, in execution.

Where under a bond a decree was adjusted by making a small deduction, and by providing for the payment of the balance as part of the entire amount of the bond,—*Held* that since the amendment made in s. 258 of the Civil Procedure Code by s. 37 of Act VII of 1888 (Act amending the Civil Procedure Code of 1882 , such adjus

(4) Uncertified payment or adjustment —*Con'd.*

ment may be recognized by a Civil Court, except in execution. **Ghanasham Lakshmandas v Kashiram Naroba. 16 Bom 589.**

2247—C P C O 21 r 2=S. 258—Execution of decree—Civil Procedure Code, Sec. 273.

A Court executing a decree for the partition of immoveable and moveable property cannot recognise an adjustment certified to it after receipt of a notice under Sec. 273 of the Civil Procedure Code. **Gopal v Joharimal P J 1891. P 214; 16 Bom 522**

Notes:—Ref: 27 Bom 556: 28 All 771 F B= 1 M L T 247=3 A L J 585=(1906) W N 237. Fol: 2 C L J 499.

2248—C P C O 21 rr 2, 1=C P C (1882) Ss. 258, 257—Payment under a sulehnama under s. 257 (a)—Certification.—

The parties to a money decree executed and filed in Court a *sulehnamah* whereby the judgment-debtor agreed to pay a certain sum of money by a certain date, and the decree-holder agreed to relinquish the balance of the decretal amount; and it was stipulated that in case of default in payment by the date fixed, the decree-holder should be entitled to recover the whole amount due under the decree. Subsequently, the decree holder having applied for execution of the decree, the judgment-debtor pleaded payment in accordance with the *sulehnamah*. No payment had been certified to the Court *Held*, that the *sulehnamah* was an agreement to give time within the meaning of s. 257 (*a*) of the Code of Civil Procedure, and the alleged payment, not having been certified under s. 258, could not be recognized by the Court executing the decree. **Madho Singh v Ram Prasad. 10 W N 68.**

(6) Certification—Legality

2249—C P C O 21 rr 2, 1=(1882) Ss.258, 257.

The plaintiff is the administrator of the estate of the late *W H*, and sues the defendant *M R* for two billiard tables and some timber, on the ground that they form part of the estate. The defence is that the defendant who purchased a decree held by one *P D* against *W H*, obtained the property in the life-time of *W H*, in satisfaction of his decree. It appears that on the

(4) Uncertified payment or adjustment —*Contd.*

16th September, 1881, *W H* wrote a letter to *N*, authorising him to give *M R*, the assignee of *P D*'s decree, the two billiard tables and timber in suit, if he would give a receipt in full payment of all demands in the matter of *P D*'s decree. *N* under the authority of this letter, transferred the property to *M R* which fact he endorsed on the back of the letter on the 17th September, 1881. Two days after *W H* died, and *M R* gave a receipt, dated the 5th September, 1881, and satisfaction of his decree was certified to the Court executing the decree. It was contended on behalf of the plaintiff (i) that *M R* is not *bona fide* assignee of the decree; (ii) that there was no valid transfer of the property under *W H*'s authority; (iii) that as the execution of the decree was in abeyance after the death of *W H*, until an executor had been appointed, there was no certification of its satisfaction which could be noticed or have effect. *Held*:—(i) that the assignment was made in favour *M R* before *W H*'s death and was recognized by him and there was nothing to show its *mala fides*; (ii) that *N* had a valid authority from *W H*, who had the power to make the conveyance; (iii) that the remaining objections were merely technical and could not be given effect to. The appeal must be dismissed.

Gobind Sahai v Mansa Ram 5 W N 45.

(7) Payment out of Court—Power of Court to go into question of satisfaction of decree.

2250—C P C O 21 r 2=S. 258 of 1882.

If a judgment-debtor, after receiving notice that the right, title, and interest of the decree-holders in the decree has been attached, pays the decree-holders the money due under the decree, the payment is not a valid payment and the Court whose duty it is to execute the decree is competent to enter into that question, and to determine whether the alleged satisfaction is binding upon the auction-purchaser of the attached right, title, and interest above mentioned. **Byjnath Sahoo v Doolar Chand Sahoo 24 W R 245.**

2251—C P C O 21 r 2=S. 258—Power of Court to examine parties as to satisfaction of decree made out of Court.

C P C (1908) O 21 r 2=(1882, S. 258) —Contd.

(4) Uncertified payment or adjustment —Contd.

A Court executing decrees, whilst giving effect to s. 206 Act VIII of 1859, should also take reasonable care that its process is not about to be abused for fraudulent purposes. It may, by examining the judgment-debtor and others having knowledge, inform itself of the position of the decree, and whether it has or it has not been satisfied. This, however, is merely an enquiry to inform the Court, and it need not frame and decide an issue. **Pareechut v Rugho Goordeo 2 N W 48.**

2252—C P C O 21 r 2=S. 258—Adjustment out of Court.

The language of the concluding clause of s.258 is too distinct and peremptory to allow of a payment which has not been certified as required by that section being recognized by the Court in an inquiry under s. 248, but any admission made by the judgment-creditor in that proceeding can be used against him, **Vinayak v Jagoji 1884 P J 202.**

2253-C P C O 21 r 2; The Second Schedule (1882 Ss. 258, 521, and 526)—Execution of decree—Arbitration out of Court—Decree according to award—Adjustment not certified—Power of execution Court to enquire into the factum of adjustment.

The provisions of s. 258 Act XIV of 1882, were never intended to apply to a case where the parties agreed between themselves that their debts were to be privately adjusted before any decree came into existence.

Where disputes between a creditor and a debtor were settled by arbitration without the intervention of a Court, and the decree was obtained in the terms of the award under s.526, Act XIV of 1882, notwithstanding that the debtor's objection that, in pursuance of the award, he had already assigned debts to the creditor in part satisfaction of the aggregate amount awarded to the latter by the arbitrator, and upon the decree-holder subsequently applying for execution of his decree in full, the judgment-debtor repeated the same objection, *held*, that the assignment was not an adjustment of a decree in whole or in part within the meaning of s. 258, and the execution Court was bound to consider that debts, if any, had been assigned, before directing execution as claimed by the creditor.

C P C (1908) O 21 r 2 (1882, S 258) —Contd.

(4) Uncertified payment or adjustment —Contd.

Per Banerji J (contra.)—The alleged assignment of debt, if true became adjustment of the decree as soon as the decree was made, and not having been certified in the manner provided by s. 258 could not be recognised by the Court executing the decree.

Gauri Singh v Gajadhar Das 6 A L J 403=2 Ind Cas 608.

2254—C P C O 21 r 2=S. 258-Enquiry by Court as to the satisfaction out of Court-Proceedings in execution of decree.

Act VIII of 1859 s. 206 applied only to proceedings which were taken while the decree was in execution and did not preclude the Court, before putting the decree in execution from enquiring if it has been satisfied out of Court.

Obhoy Churn Mookerjee v Pearee Dossia 22 W R 270.

(8) Power of Court to refuse to confirm sale and to set it aside.

2255—C P C O 21 r 2=S. 258—M certified adjustment out of Court—Subsequent execution—Fraud of decree holder.

An adjustment was arrived out of Court between a decree-holder & judgment-debtor in August 1893 but it was not certified to the Court. The decree-holder made a false statement to the agent of his judgment debtor that the required petition for certifying and adjustment was presented. He however decreed the execution and applied for & got permission to bid at the Court sale & himself purchased the property in September. The judgment-debtor presented applications in September & November requesting the Court to set aside the sale. *Held* that the judgment-debtor was entitled to prove the adjustment & to have the sale set aside.

Ramayyar V Ramayyar 21 Mad 356.

Notes.—Doub 19 Mad 318=16 M L J 33, Not Fol. 17 M L J 527.

2256—C P C O 21 r. 2; S. 47=(1882 Ss 258, 244)—Satisfaction of decree not certified owing to decree-holder's fraud—Application after time to have certified.

(4) Uncertified payment or adjustment —Contd.

S. 258 C P C, prevents an executing Court from taking cognizance of an uncertified adjustment of decree, (31 Cal 480 ; 20 Cal 32 ; 15 Mad 302). Where however, the judgment-debtors complained that the decree-holders had by fraud kept them in ignorance, till within a month of their application of the fact that the satisfaction of the decree had not been certified: *Held*—that the matter could be investigated under s. 244 of the Civil Procedure Code (19 Cal 683 Ref).
Gadadhar Panda v Shyam Churn Naik.
12 C W N 485.

Notes.—Rel. 4 Ind Cas 402=11 C L J 91.

(9) Duty of Court executing decree.

2257—C P C O.21 rr 2, 1=1882, s. 258 & 257—Inquiry—Civ. Pro Code 1859, s. 206.

A Court executing decrees, whilst giving effect to this section, should also take reasonable care that its process is not about to be abused for fraudulent purposes.

It may, by examining the judgment-debtor and others having knowledge, inform itself of the position of the decree, and whether it has, or has not, been satisfied.

This, however, is merely an enquiry to inform the Court, and it need not frame and decide an issue. **Pareechut v Ragho Goordeo.**
2 N W P 48.

(10) Sanction of Court.

2258—C P C—O. 21 rr 2, 1=S. 258 & 257.

A decree having been transferred for execution and property having been sold in execution thereof, but before the sale had been confirmed the decree-holder and the judgment-debtors entered into an agreement, which was filed in the Court executing the decree to the effect that the judgment-debtors should pay Rs.500 to the decree-holders and that they should pay the amount of the decree within three months and that the sale should be cancelled. The judgment debtors paid the Rs. 500, but on their failing to pay the decretal money the sale was confirmed. *Held* that the above agreement was an adjustment of the decree within the meaning of s. 257 (*a*) of the Code of Civil Procedure, but that, not having been sanctioned by the Court which passed the decree, it was void. (W. N. 1891, *P.* 12 and 12 *All.*, 571 referred to). **Sant Lal v Sri Kishan Das.**
15 W N 149.

2259—C P C O. 21. r.2=(1882 s. 258).—Agreement giving time to judgment-debtor—Sanction of Court.

An agreement was entered into between the judgment-creditor and judgment-debtors, whereby the latter promised to pay certain amount at once and execute a sale-deed in respect of some of his property and pay the balance some time afterwards. The judgment-debtors applied to have the adjustment certified. The decree-holder opposed the application. *Held*, that the agreement was an agreement to grant time within the meaning of s. 257-A of the Code and, not having been sanctioned by the Court, it was void.

Held further, that the Courts below were justified in refusing to sanction the agreement under the circumstances of the case.
Fateh Singh v Sham Lal. 6 A L J 726=
6 M L T 180=2 Ind Cas 991.

(11) Effect of uncertified payments to decree-holder.

2260—C P C—O. 21 r. 2=S. 258—Court's sanction to agreements to satisfy decree-Judgment-debtor's payment under void agreement.

A judgment-debtor paid to the decree-holder a sum under an agreement void by s. 257 A C. P. Code. It cannot be acknowledged or recognized by the executing Court unless it is duly certified. Such agreements if not sanctioned under s. 257A are void but if sanctioned, may be carried out in execution of the decree. **Durga Prasad Banerjee v Lalit Mohun Singh Roy.**
25 Cal 86.

(12) Refusal to certify payment to Court

2261—C P C—O 21 r. 2=S. 258-Adjustment by parties out of Court—Subsequent application for execution of decree.

When a decree has been adjusted between the parties by a contract binding upon them, a Court is not bound to issue process of execution on the original decree in violation of the terms of the

C P C (1908) O 21 r 2=(1882, S. 258) -*Contd.*

(4) Uncertified payment or adjustment —*Contd.*

contract, although the decree-holder refuses to certify the adjustment of the decree under s. 206 of the Civil Pro. Code, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract. **Krishnaji Kesava Pundit v Subbaraya Takker. 7 Mad H C R, 387.**

Notes:—Ref: 14 Mad 274; 16 Mad 466; 21 Mad 58; 18 M L J 309 F B; 19 M L J 384.

2262—C P C—O. 21 r.2 O. 32 r 7=(1882 Ss. 258,462)-Compromise by guardian after decree—Leave not obtained under S. 462.

Adjustment of decree cannot be certified. On an application, under S. 258 of the Code, for certifying that a decree claim of a minor had been adjusted by a compromise after a decree, it appeared that the guardian of the minor had not applied for and secured leave, under S.462 of the Code, to enter into the said compromise. *held*, the Court below was right in having declined to certify the above adjustment. **Arunachellam Chetty v Ramanadhan Chetty. 29 Mad 309.**

(13) Duty of defendant to see such payments certified.

2263—C P C O. 21, r. 2=Act VIII of 1859, Ss. 258,206)—Payment in satisfaction of a decree, out of Court, but not certified to Court—Court precluded from recognising such payments.

Plaintiff got a decree against defendants for possession of certain mortgage-lands, subject to the condition, that defendants were to continue in cultivation for three years, paying plaintiff the proprietor's share of the produce, out of which the plaintiff was to pay the Government revenue and apply the remainder towards the principal debt, and in the event of the principal not being paid off, he was to obtain cultivating possession. At the end of three years the plaintiff applied for possession under the decree while defendant alleged full satisfaction of the principal. *Held* that the Court executing the decree was precluded under s. 206 of Civ. Pro. Code from recognising payment made out of Court and which were not certified to Court. Even if it is intended that payment should be made out of Court the defendants should see that they are certified to Court. **Dulla v Karm. 26 P R 1878.**

C P C (1908) O 21 r 2=(1882, S. 258) -*Contd.*

(4) Uncertified payment or adjustment —*Contd.*

(14) Release without consideration—Adjustment otherwise than through Court.

2264—C P C O. 21 r. 2=S. 258 of 1882.

A had obtained a decree against B, C. and D in execution of which the sheriff attached certain property belonging to B, C. and D. who were carrying on business in partnership. The property was sold, and the proceeds paid into Court, and by order of Court A received a sum in part satisfaction of his decree. Subsequently A, at the request of B, and without receiving any consideration, gave him a letter in Bengali, purporting to be a release to him of the remainder of his decree, but such adjustment was not made through the Court. A afterwards applied for execution of his decree against B. C. and D, but his application was refused, the Court treating the letter as a release. A appealed. *Held*, on appeal, that the letter was not a release: there was no consideration for it. The adjustment of the decree should have been made through the Court or certified to it in accordance with S. 206 Act VIII of 1859.

Bhuban Mohan Bonnerjee v Saducharan Sircar 6 B L R 339; 15 W R O C 5.

(15) Uncertified adjustment—Validity of assignment—Assignment from debtor to creditor.

2265—C P C O 21 r 2=S 258:—Transfer of a bond in satisfaction of a decree—Transfer of Property Act, S. 135—Consideration paid.

Section 258 of the Code of Civil Procedure which provides that adjustments not certified to the Court should not be recognized has reference only to proceedings in execution between parties to the decree.

When a bond debt due to the judgment debtor was assigned to a decree-holder in satisfaction of his decree and this adjustment of the claim was not certified to the Court under S 258 C P C.:—

Held, that in a suit upon the bond it was not open to the debtors who were not parties to the decree to raise any objection to the assignment on the ground that the adjustment in pursuance of which the bond was transferred had not been duly certified.

C P C (1908) O. 21 r. 2=(1882, S. 258) —*Contd.*

(4) Uncertified payment or adjustment —*Contd.*

Section 125 of the Transfer of Property Act has no application to assignment made by debtors to creditors in satisfaction of a debt and no question as to the amount of money paid for the assignment arises in such cases.

Subrahmaniah Chetti v. Sattaya Pathan— 10 M L J 213.

(16) Adjustment not between decree-holder and judgment-debtor.

2266—C P C O 31 r 2=S 258-Adjustment of decree not certified.

—One B had a decree against Mussammat N in course of execution of which B died, whereupon one Mussammat S, his daughter-in-law, applied to the Court and was entered as decree-holder in his place in 1883. B's widow, Mussammat K, then sued Mussammat S regarding B's estate, and in 1886 succeeded in establishing her title to succession, whereupon she proceeded to claim execution of decree in continuation of the proceedings which had terminated temporarily in 1883. In the meantime, viz., in 1884, Mussammat K had given to Mussammat N a writing in which she gave up the decree of B against Mussammat N, and on Mussammat K's application for execution in 1886 Mussammat N met her with this document.

Held, that whether or no the document of 1884 was within the terms of Section 258 of the Civil Procedure Code as an " adjustment," the adjustment (assuming it to be one) was not between the decree-holder and the judgment-debtor within the meaning of that section, but between the judgment-debtor and a person claiming to be decree-holder, and therefore Section 258, Civil Procedure Code, was no obstacle to Mussammat N using the document to show that Mussammat K was not now entitled to execution of B's decree.

Mussammat Kishen Devi v. Mussammat Nihali 137 P R, 1888.

(17) Decree-holder becoming purchaser.

2267—C P C O 21 r 2=S. 258—Adjustment out of Court—Decree-holder becoming purchaser.—

A decree-holder, who was not barred by lapse of time in seeking to execute his decree, was op-

C P C (1908) O. 21 r. 2=(1882 S.258) —*Contd.*

(4) Uncertified payment or adjustment —*Contd.*

posed by the judgment-debtor, on the ground that the decree had been seized and sold by the Deputy Collector in execution of the decree of that functionary's Court, and that he himself (the judgment-debtor), had become the purchaser thereof. *Held* that these proceedings amounted to an adjustment out of Court, which, under s. 206, Act VIII of 1859, could not be recognized by the Court, unless certified to by the judgment-creditor himself. **Bharut Chunder Roy v. Nazir Ali Khan 10 W R, 364.**

(18) Letter from decree-holder to vakeel.

2268—C P C O 21 r 2=S. 258 of 1882.

A letter from a decree-holder to his vakeel to put in an acknowledgment into Court is not a settlement out of Court certified to the Court in the manner required by s. 206, Act VIII of 1859, to warrant further investigation in the matter. **Thakoor Lall Missree v. Kanye Lall Tewaree 7 W R 510.**

(19) Splitting decree into shares—Payments by judgment-debtor.

2269—C P C O 21 r 2=S 258 of 1882.

Payments by a judgment-debtor in satisfction of a decree which is afterwards split up into shares, if made through the Court, and while the decree is entire, ought to be taken into account and set off as in satisfaction of the whole decree **Bhyrub Nath Shaha v. Kunhya Lal Roy 20 W R, 131.**

(20) Bond given in satisfaction—Default in paying.

2270—C P C (1908) O 21 r 2=(1882) S. 258.

Where a judgment-debtor executed a kistbundi or instalment bond, providing for the satisfaction of the decree which has been obtained against him, and subsequently failed to pay according to the terms of the kistbundi,—*Held*, that the decree-holder could enforce his claim under the terms of the kistbundi by proceeding in execution, and need not file a fresh suit.

Tarif Biswas v. Kalidass Banerjee. 2 B L R, A C. 223; 11 W R. 86.

(21) Kistbundi, substitution of, for decree—Consent of parties—Execution of decree.

2271—C P C O 21 r 2=S. 258. The consent of

C P C (1908) O 21 r 2=(1882, S.258) —*Contd.*

(4) Uncertified payment or adjustment —*Contd.*

parties cannot give jurisdiction, nor can it alter the nature of the decree. An agreement introducing fresh parties cannot be substituted for the decree or become capable of execution as if it was the original decree. **Bhoopendronath Chowdhry v. Kalee Prosunno Ghose 24 W R 205.**

2272—C P C O 21 r 2=S 258 Suit on kistbundi—Adjustment through Court.

The suing on a kistbundi in Court does not necessarily make it the instrument of a public adjustment through the Court, within the meaning of s. 206 Act VIII of 1859. **Muddon Mohun Mitter v Peer Bukshun 7 W R. 485.**

Notes: - Fol: 8 W R 310

2273—C P C O 21 r 2=S 258-Kistbundi—Effect on decree—

A kistbundi or arrangment to pay by instalments the amount of a decree obtained upon a bond does not effect an extinction of the origingal debt or the mortgagee's lien upon property mortgaged to him by the bond. **Ramchurn Lall v Koondun Koomaree 14 B L R 428. Ram Churn Lall v Rughoobeer Singh 11 W R 481.**

2274.—C P C O 21 r 2=S 258—Kistbundi.

Where a decree was obtained for a sum of money, and afterwards by an arrangement between the judgment-debtor and the decree-holder it was agreed that the decree should be payable by instalments with interest at a very high rate, and payments had subsequently been made of large sums of money in the terms of the arrangement and a balance remained due, it was held that the decree-holder could not recover in execution of the decree any sum beyond what was stated in the decree. **Kanhyalal Pundit v Collector of Cuttack. 14 B L R 291 note: 16 W R 275.**

Dwarkanath Sadhoo Khan v Doorga Churn Saha. 6 W R S C C Ref, 1

2275.—C P C O 21 r 2 =S 258 Kistbundi.

There was no procedure under Act VIII of 1859 under which execution can be taken out upon a kistbundi filed in Court after decree which has not been incorporated with the decree. **Madhub Chunder Dhunput v Madhub Lall Khan. 14 B L R 288: note: 15 W R 542.**

(22) Contract superseding decree—Certification.

2276.—C P C O 21 r 2=S 258.—Civil Procedure Code, S 258.

In the course of proceedings in execution of a decree, dated the 14th June 1878, the parties, on the 11th January 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage bond, dated the 1st December 1873, in favour of the judgment-debtor by a third party, had been attached and advertised for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note of hand for Rs 250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree holder filed a petition in the Court, to the effect that under the agreement an arrangememt had been made for payment of the judgment-debt, by which the judgment debtor made over to him the bond advertised for sale in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained, and stating that after realization of the amount entered in the bond advertised for sale, and application for execution

C P C (1908) O 21 r 2=(1882, S. 258) *Contd.*

(4) Uncertified payment or adjustment —*Contd.*

would be duly filed. On this the order was that the execution case be struck off the file and the attachment maintained. On the 24th December 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment--debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January 1881, and that the application was barred by limitation, the previous application being dated the 9th November 1880. *Per* Oldfield, J—That the agreement of the 11th January 1881 did not contemplate, and had not the effect of, cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor, and in this case the only certification which was made by the decree-holder by his petition of the 11th January 1881, which was in respect of a temporary arrangement under which the decree remained in force. *Per* Mahamood, J.—That the agreement of the January 1881 was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract, but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s 258 of the Civil Procedure Code, because the creditors, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist; and that, therefore, the certification of the adjustment was inadequate and could not be recognized in executing the decree.

Fateh Muhammad v Gopal Das. 7 All, 424.

Notes.—Dist : 23 Bom 998; Ref : **11** All 228.

C P C (1908) O 21 r 2=(1882, S. 258) —*Contd.*

(4) Uncertified payment or adjustment — *Contd.*

(23) Mortgage in satisfaction of decree—Adjustment not certified.

2277.—C P C O 21 r 2=S 258—Motgage in satisfaction of decree-Adjustment not certified to the Court.

A Hindu plaintiff brought a suit to recover an ancestral property from defendant who claimed to hold it on the strength of a mortgage executed by the plaintiff's mother and guardian. The mortgage was executed by plaintiff's mother for the purpose of satisfying a decree obtained by defendant against her on a bond executed by the plaintiff's father and execution was taken by the plaintiff to the mortgage on the ground that it was given in adjustment of a decree which adjustment was not certified to the the court and therefore in accordance with S 258 of the Civil Procedure Code ought not to be recognized by any Court.

Held that the mortgage which in the absence of certified adjustment cannot be enforceable should not prevail against the plaintiff's claim. (11 Bom 6 followed: 8 Mad 277 distinguished).

Thirumalai v Sundara. 11 Mad 469.

Notes:—Con; 12 Mad 61.

2278—C P C O 21 r 2=(1882 S.258)-Amounts realized by usufructuary mortgagee in possession.

Amounts realized by a usufructuary mortgagee remaining in possession after a decree for sale cannot be applied in satisfaction of the decree amount unless certified under S. 258, C P C and *a fortiori* in case of realization under mortgages not the subject of the suit or decree.

Ramasami Naik v Ramasami Chetty. 17 M L J 201.

(24) Separate suit—Uncertified payment.

2279—C P C O 21, r 2=(1882 S. 258,)—Recovery of money paid to a decree-holder out of Court.

A separate suit will lie for the recovery of money paid to the decree-holder out of Court but not admitted by the Court executing the decree owing to the payment not having been cer-

(4) Uncertified payment or adjustment —*Contd.*

tified. (8 All 538 ; 10 Cal 354 ; 21 Mad 409 Fol. (6 Bom 146; 11 Bom 6; 19 Cal 683 ; 20 All 254; 21 Cal 437 Ref.) **Atma Ram Patel v Kisan Kirad.** **17 C P L R 60.**

(25) Payment twice over-Suit for recovery of that amount.

2280—C P C O 21 r 2; s. 47=(1882 S. 258, 244)—Maintainable.

Ss. 244 and 258 of the C P C do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree-holder privately and the payment of which, not being certified, could not be recognised and for which the decree holder had taken out execution over again (8 All 538 ; 21 Mad 409, Fol.) **Gendo v Nehal Kunwar.** **[illegible] A L J 475 = A W N (1908), 220.**

2281—C P C O 21 r 2=S. 258 of 1882.

Where the payment out of a sum in satisfaction of a decree could be proved as a fact by the evidence of the judgment-creditor supported by his receipt, held that the third paragraph of S. 258 of the Civil Procedure Code did not apply to the case. **Balaji Lakshman Patneker v Dada Joti.** **P J (1887) 327 = 12 Bom 235.**

(26) Right of suit on agreement in adjustment of decree.

2282—C P C O 21 r 2 (=C P C 1882 S. 258)

A suit is maintainable when based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court (15 Bom 419 Fol.) **Mt. Chunna Bai v Kamarali.** **6 C P L R 133.**

(27) Rejection of—Suit to recover thing given in satisfaction.

2283—C P C O 21 r 2=S. 258—Rejection of objection that decree had been satisfied out of Court.

Held that the rejection, under s. 206 of Act VIII of 1859, of a defendant's objection in a mofussil Small Cause Court to the execution of a decree, on the ground that it had been adjusted out of Court, did not bar his right to bring a suit

(4) Uncertified payment or adjustment —*Contd.*

against the execution—creditor to recover the thing alleged to have been given in satisfaction of the decree. **Gulawal Chandabhai v Rahimtulla Jamalbhai.** **4 Bom H C R A C 76.**

Notes—Fol: 4 Bom 295. Ref: 11 B H C R 151; 11 Bom 6 F B

(28) Suit by judgment-debtor to recover money paid out of court.

2284—C P C O 21, r 2=S. 258—**Fraud.**

A judgment-debtor who has paid money to his creditor who has refused to certify satisfaction, can sue upon equitable grounds independent of fraud to recover that amount. **Mamu v Kalu Mall.** **66 P R 1877.**

2285—C P C O. 21, r 2—Failure to certify payment made out of Court—Attempt to execute decree—Payment of amount over again by judgment-debtor—Suit for recovery of amount paid out of Court. **11 Ind Cas 1.**

(29) Suit by surety against principal for amount paid.

2286—C P C O 21 rr 2, 1=(1882 Ss. 258, 257 (b))—Payment to decree-holder-Money paid out of Court by a surety not being certified.

It is immaterial whether such pre-appointed evidence as to payment by the surety of the decree amount as the certifying, procured prior to the date of suit by him against the principal inasmuch as the payment out of court is valid under s. 257 (b), and S. 258 simply prescribes the procedure for recording, the fact of such payment in the court which has to execute the decree. **Narayana Murti Ayyar v Marimuthu Pillai.** **26 Mad 328.**

Notes:—Ref: 14 M L J 285.

(30) Suit for money paid in execution of decree.

2287—C P C O 21 r 2—S. 258-Suit for money paid in execution of decree after payment not through the Court.

(4) Uncertified payment or adjustment
—Contd.

Plaintiff owed defendant a judgment-debt. He paid the debt, but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court, being debarred by s. 206 of the Code of Civil Procedure from recognizing payments made otherwise than through it, executed the decree by making the plaintiff pay again the sum decreed. Plaintiff sued to recover the amount overpaid. *Held* by the majority of the Court (Scotland, C J and Innes, J., dissenting) that such a suit is not maintainable. (**Anunachella Pillai v Appava Pillai.**

[illegible] Mad H C R 188

Kunhi Moidin Kutti v Ramen Unni.

1 Mad 203

Notes:—Not Fol: 6 Mad 41. Dist: 1 Mad 203 Con: 1 All 388; 3 All 538; 5 All 94. Ref: 7 M H C R 387; 5 Mad 397 F B; 11 Bom 6 F B.

(31) Suit to recover instalments.

2288—C P C O 21 r 2=S. 258 of 1882.

Under s. 258 of the Civil Procedure Code, no Court can recognize an uncertified adjustment of a decree for any judicial purpose whatever. (6 Bom 146, overruled.) A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree: as there is, in that case, no consideration which the Court can recognize, and therefore no valid consideration for the judgment-debtor's agreement. The plaintiff was the assignee of a decree obtained by one *O K* against the defendants on the 5th May 1883. By that decree, *O K* was declared entitled to recover Rs 9,961-5-6, with interest at nine per cent., from the defendants; and payment was ordered to be made to him of the said sum by weekly instalments of Rs 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to *O K* of certain property, with power to him to sell the same and to execute the decree for the whole amount, in case of default, for six months. *O K* assigned the decree to the plaintiff in the present suit, and subsequently to the assignment (*viz.*, on

(4) Uncertified payment or adjustment
—Concld.

the 21st July 1883) the defendants executed to the plaintiff the mortgage on which the present suit was brought. The mortgage-deed, after reciting the abovefacts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant by the defendants that they would pay Rs 9,961-5-6, with interest at six per cent, by monthly instalments of Rs 400 from the 21st August 1883. The mortgage, therefore, differed from the decree, both with regard to the instalments and the rate of interest. The plaintiff sued to recover the sum of Rs4,207, being the amount of instalments due to him under the said mortgage. *Held* that the suit would not lie, as the mortgage was an adjustment of the decree, and had not been certified to the Court [illegible] required by s. 258 of the Civil Procedure Code.

Abdul Rahiman v Khoja Khaki Aruth.

11 Bom 6.

Notes—Ap: 11 Bom 724 Fol: 11 Mad 469. Dist: 15 Cal 187. Ref: 20 Cal 32; 21 Cal 437; 12 Bom 255; 13 Bom 171; 21 Bom 122; 22 Bom 463 F B; 31 Cal 450; 8 O W N 395.

5 EFFECT OF PAYMENT TO ONE OF SEVERAL JOINT DECREE-HOLDERS.

(1) Execution of decree-Joint decree.

2289—C P C O 21 r 2=(1882 S 258)-Execution of decree—Joint decree.

Where payment is made by a judgment-debtor out of Court to one of two or more joint decree-holders, and the payment is certified to the Court by that decree-holder, the other decree-holder or decree-holders are not debarred from executing the decree to the extent of his or their share or shares. (4 C L R 70 F. S. A. No 1167 of 1902 unreported. 1 Agra Mis Ap. 16 (2 [illegible] L R Ap 43, 15 Mad. 348, 9 Cal 831 followed. 22 W R 77 dissented from)

Moti Ram v Hanno Pershad.

26 All 334—1 A L J 40=24 W N 34.

(5) Effect of payment to one of several joint decree-holders—*Concld.*

Notes—Fol: 28 All 252=3 A L J 49=(1906) W N 16.

(8) Power of several joint decree-holders to certify.

2290—C P C O 21 r 2=S 258 (1882)—**Execution of decree**—Satisfaction of entire decree

One of two or more joint decree-holders is not competent, without direct authority from the other decree-holders, to certify to Court satisfaction of the entire decree by payment out of Court. The payment, if real, cannot operate as a discharge of the decree except as to the share therein of the recipient. (26 All. 334 and 25 Mad 431. Foll 22 W R 77 Dist:) **Dhanraj v Ujain Singh 34 P R 1906=93 P L R 1906.**

6 NON-CERTIFICATION IS NO BAR TO A SUIT FOR DAMAGES.

(1) Damages to judgment-debtor—suit for—Cause of action.

2291-2292—O 21 r 2 (1882 S.258)—payment to decree—holder-Uncertified-Attachment of the uncertified decree—Judgment-debtor obliged to pay the debt again.

When a judgment-debtor pays out of Court the decree amount there is an obligation on the part of decree-holder to report satisfaction to the Court. The consideration for the payment is certifying payment. Otherwise the payment is without consideration and the judgment-debtor is entitled to get back the money so paid.

In a suit for damages the cause of action arises only when damage is sustained and the amount recoverable is the amount paid the second time. **Shanmugappa v. Marappa, 7 M L T 351.**

(6) Non-certification is no bar to a suit for damages—*Contd.*

(2) Suit for breach—Contract in not certifying payment to Court.

2293—C P C O 21 r 2=S, 258 of 1882.

A suit will, notwithstanding s, 306 of Act VIII of 1859, lie for damages for [illegible] alleged breach of contract in not certifying to the Court a payment of money in satisfaction of a decree made out of and not through the Court, in consequence of which the same was fraudulently recovered a second time by the person omitting to certify the said payment. **Motee Lall Mookerjee v. Kanhai Lall. 1 N W [illegible] Ed 1873: 237 Agra F B Ed 1874 185.**

Notes.—Ref: 5 Mad 597 F B.

(3) Suit by judgment-debtor to recover amount-Cause of action—Damages.

2294—C P C O 21, r.2=S.258 (1882)—Decree-holder paid out of Court-Satisfaction not entered

X remitted by post office money order the amount due by him under a decree. Y received the money order but failed to certify the receipt of the amount and enter up satisfaction of the decree.

Held that X can sue Y for the recovery of amount so paid [illegible] damages by reason of Y's failure to certify. The law casts on [illegible] decree-holder receiving payment out of Court the duty of certifying such payment in satisfaction of the decree and a cause of action accrues when the judgment-creditor fails to fulfil his duty in the matter. (5 Mad 397 F B Fol: referred Case No. 9 of 1905 Not followed.) **Media Thalavoi v Kaliam Anni. 3 M L T 15=30 [illegible]**

(4) Suit to recover money so paid, after execution of entire decree.

2295—C P C O 21 r 2=S 258—Part satisfaction of decree not certified to the Court—Act XXIII of 1861, [illegible] 11.—

A, a judgment-debtor, paid to B, the decree-holder, a [illegible] of money by way of compromise in full satisfaction of the decree. B failed to certify this payment to the Court, and afterwards executed her decree for the full amount. In a suit by *A* against B for recovery of the amount

C P C (1908) O 21 r 2=(1882, S 258) -Contd.

(6) Non-certification is no bar to a suit for damages - *Contd.*

previously paid out of Court in satisfaction of the decree,—*Held* that notwithstanding s 11 of Act XXIII of 1861, the suit was maintainable.
Gunamani Dasi v Prankishori Dasi.
5 B L R 223: 13 W R F B 69

Overruling **Alunga Bebee v Gooroo Churn Roy** **3 W R S C C Ref 8.**
Bhugoban Tantee v Gobind Chunder Roy. **9 W R 210.**

Where it was held that a suit would lie for damages for breach of contract is not certifying the payments.

(5) Contract to certify satisfaction of decree Suit for damages.

2296.—C P C O 21 r 2=S 258 - Breach of.—

The provision in s 258 of the Code of Civil Procedure, 1882 which forbids any Court to recognize a payment under, or an adjustment of a decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify. **Mallama v. Venkappa** **[illegible] Mad 277.**

Notes—Fol: 12 Mad 61; 13 All 339. Dist: 11 Mad 469; 18 Mad 26; 10 Bom 155. Ref: 20 Mad 369; 2 M L J 231; 11 Bom 6.

(6) Remedy by separate suit for damages.

2297.—C P C O 21 r 2 (=s 258, Civ, Pro Code, 1882)- Execution proceedings—Satisfaction of decree out of Court—Failure of judgment-creditor to certify satisfaction.—

An uncertified adjustment of a decree cannot be pleaded in execution proceedings. The proper remedy is by a suit for damages. **Maung Myaing v. Maung Shwe Hmon.**
L B R 1893—1900 621.

(7) Right to sue—Damages for breach of contract.

2298.—C P C O 21 rr 2, 1=C P C 1882 Ss 258 & 257-Payment out of Court—Civ Pro 1859, s 306.—

A suit will, notwithstanding this section, lie for damages for an alleged breach of contract in not certifying to the Court a payment of money in satisfaction of a decree, made out of and not through the Court, in consequence of which the same was fraudulently recovered a second time, by the person omitting to certify the said payment. **Mootee Lal Mookerjee v. Khandhai Lall** **1 N W P 237.**

C P C (1908) O 21 r 2=(1882, S. 258) -Contd.

(6) Non-certification is no bar to a suit for damages—*Concld.*

(8) Application, it can be treated as one under s 258—Fraud-Damages.

2299. - C P C O 21 r 2=Ss 244, 258—Decree, execution of application for—Certificate of adjustment.—

The provisions of s 258, Civ Pro Code, 1882, are express, and no payment or adjustment shall be recognised by the execution Court unless it has been certified, and, therefore, an alleged adjustment relied on by the judgment-debtor is no answer under S 244 of the said Code to an application for execution of a decree. The application cannot be treated as one under S 258 of the Code.

If in point of fact the decree-holder agreed with the judgment-debtor that he would not execute his decree and that the matter should be settled between them, then if he broke that agreement he would be liable for an action for damages. **Bajrang Bihari Lal v Lachmi Narain** **15 C L J 88.**

7 UNCERTIFIED ADJUSTMENT MAY BE RECOGNIZED BY OTHER COURTS THAN THE COURT EXECUTING THE DECREE.

(1) Decision of executing—Court when final No regular suit.

2300.—C P C O 21 r 2—Res-judicata—Execution of decree—Adjustment of decree out of Court.—

Held, that, when the application of the judgment debtor under O XXI r 2 of Act V of 1908 for recording private payment or adjustment by him of the decree is presented within the limitation prescribed therefor and has been rejected by the Court executing the decree, its decision cannot be attacked in a regular suit. (16 P R 1910=18 P W R 1910=5 Ind Cas 814, Dist).
Hafiz Abdulla Khan v. Kanhaya,
92 P W R 1912.

(2) Adjustment made out of Court not admissible by the Court in execution.

2301—C P C O 21 r 2=s 258—Adujstment out of Court.

C P C (1908) O 21 r 2=(1882, S.258) -Contd.

(7) Uncertified adjustment may be recognized by other Courts than the Court executing the decree—*Contd.*

According to s 206, Act VIII of 1859, no adjustments made out of Court were admissible by the Court in execution. **Motee Lall v Ram Dass** **W R 1864 Mis 38.**

Bhya Bhoopnath Sahee v Kunwan **7 W R 134.**

Gunga Gobind Gooptoo v. Makhun Lall Hattee **9 W R 362.**

(3) Refusal to certify to Court.

2302.—C P C O 21 r 2=S. 258 of 1882.

Where a payment alleged to have been made in satisfaction of a decree is not certified to the Court executing the decree, the Court is bound to proceed as if such payment had never been made. If such payment has in fact been made to the judgment-creditor and he dishonestly refuses to certify it to the Court when called upon to do so, he can be made liable to refund it in an action. **Mahomed Kazem Jowhurry v Katoo Bebee.** **20 W R 150.**

Notes.—Fol 33 Cal 410=10 C W N 276=4 C L J 102; 3 C L J 521; 13 Cal 322. Dist 1 Bom 190; 17 Bom 235: 24 Bom 616. Ref. 10 Bom 634.

(4) Suit by assignee to establish right to attached property.

2303.—C P C O 21 r 2=S. 258 of 1882.

The plaintiff brought a regular suit under s. 283 of the Code of Civil Procedure, to establish his right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor. *Held* that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above mentioned relates only to the Court executing the decree. **Kalyan Singh v Kamta Prasad.** **13 All 339; 11 W N 100.**

Notes.—Dist 20 All 254.

C P C (1908) [illegible] 21 r 2=(1882 S. 258 -Contd.

(7) Uncertified adjustment may be recognized by other Courts than the Court executing the decree—*Concld.*

(5) Court not bound to issue process upon original decree.

2304.—C P C O 21 rr. 2, 1 =(Civ Pro Code 1882 Ss. 258, 257)=(S. 206 of 1859)—Decree adjusted between parties by contract binding upon them.

Where a decree has been adjusted between the parties by a contract binding upon them, a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract, although the decree-holder refuses to certify the adjustment of the decree under s. 206 Civil Procedure Code especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract. **Krishnaji Kesava Pundit v Subbaraya Takker.** **7 M H C 387.**

Notes.—Ref 2 M L J 221.

8 NON—CERTIFICATION IS NO BAR TO A CRIMINAL PROSECUTION.

2305.—C P C O 21 r 2=S 258—Fraudulent execution of decree—Duty of the decree-holder to inform the Court of private adjustment or satisfaction of a decree—Construction of Penal Code, ss. 193, 210, 406.

The rule of civil procedure contained in the last clause of s. 258 of the Civil Procedure Code (Act XIV of 1882)—That uncertified adjustment of a decree are not to be recognized by "any Court"—does not affect the substantive criminal law. The words "any Court" in that clause have no application to a Criminal Court investigating a charge of fraudulently executing a decree under s. 210 of the Penal Code. Those words do not bar any criminal remedy which an injured judgment-debtor may have against a fraudulent decree-holder whether by a prosecution under ss. 193 210, 406, or any other section of the Penal Code. In s 210 of the Penal Code the word "satisfied" is to be understood in its ordinary meaning and not [illegible] referring to decrees the satisfaction of which has been certified to the Court. **Queen Empress v Bapuji Dayaram.** **10 Bom 288.**

Notes:—Ref 11 Bom 6 F B 599.

2306—C P C O 21 r 2=(1882 S. 258)—Decree—Execution—Adjustment of decree outside

C P C (1908) O 21 r. 2=(1882, S.258) —*Contd.*

(8) Non certification is no bar to a criminal prosecution—*Contd.*

the Court—Adjustment not certified to the Court—Decree-holder acting under adjustment and receiving moneys under it for several years-Estoppel by conduct—Indian Evidence Act I of 1872 S. 115—Fraudulent execution of decree—Criminal law.

In execution of a decree, an adjustment of it outside the Court was pleaded. The adjustment not having been certified to the Court under S. 258 of the Code of 1882, it was contended that the Court could not recognise it as valid. The Court overruled the contention, holding that, as the decree-holder had acted upon the adjustment and received moneys under it, he was estopped by conduct under S. 115 Evidence Act, 1872. On appeal,

Held, the view of the lower Court gives the gobye to the plain language of the last paragraph of S. 258 of the C P C 1882.

S. 258 says that a Court which is asked to execute a decree for money, shall not recognise for the purposes of execution any adjustment of it, whole or partial, or any payment, made outside the Court and not certified to it as required in the preceding part of the section. When the law directs that such an adjustment or payment "shall not be recognized" for the purposes of execution it means that the adjustment or payment, as the case may be, should be treated as an invalid or void transaction so far as the executing Court is concerned. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of S. 258 of the Code enacts a special law for a special purpose, whereas S. 115 Evidence Act relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

Per Chandavarkar J.—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice and decree-holders who enter freely into adjustments outside the Court and do not certify them as required by law but fraudulently apply for execution, ignoring the adjustment should be dealt with under the criminal law.

Per Heaton J.—The puprose of S. 258 of the Code is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise in this sense, that it, at the outset, assumes that what is not recorded as paid or adjusted still remains unpaid or unadjusted. But it is still open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due having been paid or adjusted and it is still incumbent on the Court to go into the matter if a contest on the point is raised. To state the result briefly, the final clause of S. 258 raises a presumption, but does not limit the jurisdiction of the Court. **Trimback Ramkrishna Ranade v Hari Laxman Ranade.** **12 Bom L R 686.**

C P C O 21 r 2=S. 258.—Certifying payment without any execution application pending—Step in aid of execution—Limitation.

8 A L J 487.

9 LIMITATION OR STEP IN AID OF EXECUTION.

(1) Adjustment certified by general attorney of decree-holder within jurisdiction.

2307.—C P C O 21 r 2=(1882 S. 258)—Adjustment of decree certified by general attorney of decree-holder within jurisdiction.

An application under s 258 C P C to certify an adjustment of a decree made out of Court, although an application to the Court to take a step in aid of execution of the decree is not an application made in accordance with law, if made by the general attorney of the decree—holder at a time when the decree holder himself is residing within the jurisdiction of the Court executing the decree. (23 All 499 referred to I All 510. distinguished.) **Kasumri v Beni Prasad.**

26 All 19=1903 A W N 172.

(2) Payment not certified if may be taken to extend limitation.

2308.—C P C O 21 r 2=S. 258 of 1882.

Under O XXI r 2 of the Civ Pro Code an

C P C (1908) O 21 r 2=(1882, S.258) —Contd.

(9) Limitation or step in aid of execution —Contd.

adjustment or payment of a decree which is not duly certified cannot be recognised by the Court for any purpose whatever *e.g* for extending the time of limitation. **Kutabullah Sarkar v Durga Charan Rudra. 16 C W N 396=13 Ind Cas 424.**

(3) Court cannot recognize arrangement enlarging the period of limitation.

2309—C P C O 21 r 2=S. 258—Limitation—

The Court cannot recognize any arrangement between the parties enlarging the period of limitation allowed by law for the execution of decrees or which alters the terms of the decree. **Krishna Kamal Singh v Hiru Sirdar. 4 B L R F B 101.**

Kisto Komul Singh v Huree Sirdar. 13 W R., F B., 44.

Meheroonnissa v, Roushan Jehan. 17 W R., 396.

Ram Runjun Chuckerbutty v Jowhurujumah Khan. 23 W R., 129.

(4) Effect of such payments on limitation for application for execution of decree.

2310—C P C O 21 r 2=S. 258 — Payment made towards decree, but uncertified.—

Where certain payments had been made on account of a decree, but such payments had not been certified to the Court under s. 258 of the Civil Procedure Code, it was *held*, following 4 B L R, F B 130, that such payments, although not certified to the Court, were effectual to prevent the appellant's application for execution from being barred by limitation. It would, however, be necessary for the appellant to certify these payments. **Purmanandas Jiwandas v. Vallabdas Wallji, 11 Bom 506.**

Notes:—Fol: 21 Bom 122; 16 All 483. Ref: 2 Bom L R 887; 1 All 42.

2311—C P C O 21, r 2=(1882 S.258)-Execution application—Limitation—Payment out of Court.—

Held, that for the purpose of deciding whether or not an application for execution is barred by limitation, it is competent to the executing

C P C (1908) O 21 r 2=(1882, S. 258) —Contd.

(9) Limitation or step in aid of execution —Contd.

Court to take into consideration a payment made out of Court, by the judgment-debtor in part satisfaction of the decree although such payment may not have been certified in the manner provided for by s. 258, C P C. (17 All 43; 21 Bom 122 and 12 All 569, overruled.) **Roshan Shing v. Mata Din. 26 All 36=1903 A W N 179.**

Notes:—Ref: 6 A L J 356; 31 All 590.

(5) Payments made without sanction of Court

2312—C P C O 21 r 2=C P C Ss. 258 & 257A:—

The provisions of S.258 of the Civil Procedure Code with reference to a payment made in pursuance of an agreement of the nature mentioned in S. 257 A, refer to a payment made in pursuance of a lawful agreement which has received the sanction of the Court and where there is payment made in pursuance of any agreement which has not received the sanction of the Court, the provisions of Art. 161 of the 2nd schedule to the Limitation Act do not apply, and the Court is bound to credit the payment towards the decree amount when it is brought to its notice. **Narayana Devu v. Venkataramanayya. 1 M L J 332.**

See also 25 Cal 87 (r).

2313—C P C O 21 r 2=C P C Ss. 258, 257 A —Composition deed releasing judgment-debtor—Adjustment —Time of sanction for agreement to give time.

Held, by *Muthusamy Aiyar* and *Best*, *JJ.*, (reversing the decision of *Parker, J.*) that a composition deed assented to by the decree holder whereby the judgment-debtor transfers all his assets to trustees to pay his debts rateably and is himself released from all liability for debts, is not an agreement to give time to the judgment-debtor under s. 257A of C P C, but an adjustment within the meaning of S. 258 and that the decree-holder is entitled to execute the decree notwithstanding the adjustment, if it has not been certified according to law.

Per Parker, J. An agreement to give time to the judgment-debtor under s. 257A may be sanctioned by the Court at any time during which the decree is alive. **Ramasami Chetty v. Venkatesa Tawker. 2 M L J 221.**

(6) Adjustment of decree—Limitation Act Sch. II. Art. 173A.

2314—C P C O 21 r 2=(1882)S.258-Transfer of Property Act (IV of 1882), secs. 89, 104—Civil Procedure Code Act (XIV of 1882), secs. 244, 258—Preliminary mortgage-decree—Payment before decree absolute.—

A Court to which an application is made under sec. 89 of the Transfer of Property Act has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the application and to make the order absolute for the realisation of that amount only.

Sec. 258 Civil Procedure Code, does not apply to an application made under sec.89 of the Transfer of Property Act, that section not having been made applicable by any rule issued by the High Court under sec. 104 of the Transfer of Property Act; consequently Art. 173A of sch. II of the Limitation Act does not apply to the case of any payment made before a decree absolute is made.

Any question that arises as to an order absolute for sale is not a question relating to the execution of the decree. **Hatem Ali Khundkar v. Abdul Gaffur Khan.** **8 C W N 102.**

Notes:—Ref: 12 C W N 282=7 C L J 581. Diss: 30 All 248=(1908) W N 103=5 A L J 272. Dist: 9 C L J 358.

2315—C P C O 21, r 2=(1882 S.258)—Mortgage decree—Order absolute—Payment out of Court before and after order absolute—Limiation Act (XV of 1877), Sch. II, Art. 173A.—

Before an order absolute has been made in a mortgage decree, it is the duty of the Court to determine in respect of what sum the decree-holder is entitled to an order absolute. On this footing the Court is bound to consider any allegations of payment by the defendant after the date of the decree *nisi* and before the date of the application for an order absolute.

Different considerations, however, apply when a payment or an adjustment is alleged to have been made subsequent to the order absolute in answer to an application by a mortgagee decree-holder to bring the mortgaged properties to sale. The execution Court can be invited to determine the question only under s. 258 of the C P C 1882.

If an adjustment has not been recorded within the period of limitation under Art. 173-A of the Limitation Act, 1877, it cannot be taken notice of by the executing Court. (8 C W N 102; 29 Cal 651; relied upon. 1 Ind Cas 677; 10 C L J 91. Ref: 4 Ind Cas 402; 11 C L J 91; 28 Mad 473; (F B); 15 M L J 126 followed. 12 C W N 485 distinguished; 7 Ind Cas 55, referred to).

Hiramony Biswas v. Musa Khan,
7 Ind Cas 625.

2316—C P C O 21. r 2=(1882 S. 258)-Transfer of Property Act, S. 57—Agreement by buyer of mortgaged property to pay an agreed sum to mortgagee holding decree for sale, and payment into Court by him in adjustment of such decree out of Court-Limitation Act, Art. 173A-Application for adjustment of decree to be recorded.

Where A held a mortgage decree against B, and C. with the consent of A and on his agreeing to take a sum in satisfaction of his decree, bought the property and paid the money into Court, *Held*, that an application by C to record the adjustment of the decree and declare the property free of incumbrance is not governed by S. 57 of the Transfer of Property Act, as it involved a question of the adjustment of a decree out of Court, nor by S. 258, C P C, as the decree was not one for money, and that the petitioner was not precluded by Art. 173 A of the Limitation Act from proving the agreement under s. 244, Cl. (c), and was entitled, on paying the money into Court for the declaration. **Mallikarjuna Sastri v. Narasimha Rao,** **24 Mad 412.**

Notes:—Over: 28 Mad 473 F B=15 M L J 126. Diss: 30 All 248=(1908) W N 103=5 A L J 272. Ref: 9 Bom L R 1380. Not Fol: 29 Mad 318.

2317—C P C O 21 r 2=S. 258 of 1882-Limitation Act, Sch II. Art. 173 (A) — Decree for surrender of property.

S 258 of the Civil Procedure Code is applicable only to decrees under which money is payable and has no application to other kinds of

(9) Limitation or step in aid of execution —*Contd.*

decrees. Sankara Nambiar v. Kanara Kurup,
22 Mad 182=8 M L J 175.

Notes:—Ref: 9 Bom L [illegible] 1380; 24 Mad 412.

2318—C P C O 21 r 2=S. 258 of 1882—**Mortgage decree** — Payment to decree-holder before **and after order absolute**—Execution-Civil Procedure Code (Act XIV of 1882), S. 251—Limitation Act (XV of 1877), Sch. II. Art. 173-A.

Where the mortgagee makes an application **for an order absolute**, and the mortgagor has previously **made any payments** towards satisfaction **of the judgment-debt**, it is open to him to urge **that an order absolute** ought not to be passed for **the entire sum**, or that an order absolute ought **to be passed for** [illegible] smaller sum than what is mentioned **as due in the** decree *nisi*. When a decree **has once been made**, it is conclusive between the **parties.**

S. 58, C P C (1882), applies to preceedings in **execution of mortgage** decree. Hence any payment **alleged to have been** made to the decree-holder **and not certified** by him within the time **prescribed by Art**, 173-A, of the Limitation Act **(XV of 1877)** cannot be considered by the execution **Court.** (8 C W N 103; 29 Cal 810. Ref 7 C L J 581;25 Cal 703; 8 C W N 102;21 Mad 412 Dist:) **Nistarini Dasi v Kazim Ali, 12 C L J 65=**
7 Ind Cas 258.

(7) Counter petition cannot be treated as [illegible] application to certify, when not put in within the time-Limitation Act Art 174

2319-C P C 1908 O 21 rr 2,15=(1882)Ss. 258,231 **Act V of 1908**, O 21 r 2 corresponding to S. 258 of **Act XIV of 1882**-Executing Court cannot recognise **an uncertified** adjustment-Judgment debtor's **counter-petition** cannot be treated as an application **to compel the** decree-holder to certify, when **not put in within** 90 days—S. 231 of Act XIV of 1882 —**Execution** by one of two decree-holders—**Discretion of the** Judge thereunder.

S. 258, clause 3, of the Civil Procedure Code, is **imperative that the** executing Court cannot recognise **an adjustment** which has not been certified. **The clause is certainly** applicable where in answer to [illegible] application for execution, an adjustment is set up by the judgment-debtor.

The judgment-debtor's counter-petition cannot be treated as an application to compel the judgment-creditors to certify the adjustment, when it [illegible] not put in within the time allowed by art. 174 of the limitation Act, i. e., within 90 days of the adjustment.

The Court cannot enquire into [illegible] adjustment not certified to the Court according to law.

When the judgment of the Lower Court does not show that the judge, being aware of the discretion vested in him by S 231, intended to exercise it in favour of the applicant, one of two joint decree holders after considering the circumstances of the case, *held*, the judgment must be set aside, and the case remanded for disposal according to law. (12 C W N 485, Fol. 21 Mad 356; 29 Mad 312 17 M L J 527; 21 Mad 409. Ref 12 C W N 486 Dist: and 12 Bom L R 686, Considered). **Alathoor Badrudeen v Gulam Moideen,**
10 M L T 396=(1911) 2 M W N 473.

(8) Limitation Act Art 182—Step in aid of execution.

2320—C P C O 21 r 2—**Civ. Pro.** Code (XIV of 1882), Ss 257. A, 258—**Applicability** to decree under S. 88 of T P Act.

An application under Sec. 258, C P C (1882), calls upon the Court to do a certain act, which *ipso facto* satisfies the decree to the extent of the payment certified, and without which the decree would not be satisfied to any extent whatever. Such an application, therefore, is a step-in-aid of execution. S. 257-A of the Code does not apply to a decree under s. 88 of the Transfer of Property Act. **Chotey Singh v Ishwari.**
7 A L J 251=5 Ind Cas 295.

2321-C P C O 21 r 2=S 258-**Decree payable by** instalments-Limitation-Waiver by **decree-holder** —Payment out of Court—Limitation **Act (XV of** 1877), sch. II art 179 (6).—

An application for execution of a decree **payble** by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and

C P C (1908) O 21 r 2=(1882, S. 258) –Contd.

(9) Limitation or step in aid of execution —Contd.

that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards and that the application was in time, having been made within three years from the date when the second instalment was due. *Held* that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 258 of the Civil Procedure Code, be recognized. (4 All 316 and 7 All 317 not followed) **Mitthu Lal v Khairati Lal** **12 All 569.**

Notes:-Diss: 21 Cal 542; 21 Bom 123. Over 26 All 36.

(9) Acknowledgment in the Court of the Collector of part payment of decretal money.

2322 -C P C O 21 r 2=S. 258-Civ Pro Code (1882), s 320—Limitation Act (XV of 1877), ss. 19 and 20—Execution transferred to Collector.—

Where, after a decree had been sent to the Collector for execution under the provisions of s. 320 of the Code of Civil Procedure, the decree-holder and judgment-debtor joined in an application to the Collector in which they stated, on the one hand, that the decree-holder had received Rs. 2,900 in part payment of the decretal amount, and, on the other, that there was a certain balance due from the judgment-debtor under the decree and that arrangements had been made between the parties for the payment of such balance- *Held*, that the above application was properly made to the Collector as being, within the meaning of s. 258 of the Code of Civil Procedure, "the Court whose duty it is to execute the decree," and that the application was a valid acknowledgment for all purposes and sufficient under ss 19 and 20 of Limitation Act, 1877 to save limitation in respect of the execution of the decree. **Muhammad Said Khan v Payag Sahu.** **16 All 228.**

Notes:—Ap: 22 Bom 723. Ref: 26 All 36.

(10) Decree payable by instalments—Execution of decree-Limitation.

2323-C P C O 21 r 2=S 258-Where a creditor has obtained a decree for money payable by instalments, the whole amount to become due on failure by the debtor to pay one of the instalments, he is upon failure entitled, notwithstanding s. 206 of Act VIII of 1859, to come into Court and certify to the Court and prove payment of the earlier instalments, to show that execution of his decree is not barred. **Fakir Chand Bose v Madan Mohun Ghose.** **4 B L R F B 130; 13 W R F B 40.**

Juggut Mohinee Dossee v Madhub Chunder Kur. **15 W R 66**

2324—C P C O 21 r 2=S 258—Instalment bond intended to revive barred decree. -

An instalment bond by a judgment-debtor acknowledging a balance to be due under the decree but executed without consideration, and after the decree is barred by limitation cannot either revive a decree or be legally binding on his representatives. **Heera Lall Mookerjee v Roy Dhunput Singh.** **24 W R 282.**

2325—C P C O 21 r 2=S. 258—Payment not certified to court—C P Code (act VIII of 1859) S. 206—Instalments decree —

An instalment decree left the choice of realising the decretal amount at once on failure to pay the instalments according to the decree. The first instalment was paid but not certified to the court. The plaintiff applied for the execution of the decree stating that only the first instalment had been paid, and asked for execution for the balance. The judgment-debtors decreed the payment of any instalment. *Held*—that although under the provisions of s 258 of C P Code 1882, the payment in question if made would not be recognized as a payment or adjustment of the decree yet it was competent to the decree holder to prove such payment for showing that the execution was within time. There is no material difference in this respect between s. 258 of C P Code 1882 and s. 206 of the old Code act (VIII of 1859) on which the case of 4 B L R 130 was decided. **Hurri Pershad Chowdhry v Nasib Singh** **21 Cal 542.**

Notes —Fol 19 Mad 162; 21 Bom 122; 17 All 42; 31 Cal 297. Dist: 24 Cal 281.

2326—C P C O 21 r 2=S. 258—Bond payable by instalments—Execution of decree—Limitation.

(9) Limitation or step in aid of execution —*Contd.*

A judgment creditor is entitled to prove payments made according to the terms of a kistbundi for the purpose of showing that his right to sue out execution under the kistbundi was not barred by limitation.

Bhuboneswari Debi v Dinanath Sandyal 2 B L R A C 320: 11 W R 232.

Bishto Chunder Chuckerbutty v Woomanath Roy Chowdhry 15 W R 459.

(11) Proof of such payment for the purpose of determining the question of limitation.

2327—C P C O 21 r 2=S. 258—Civil Procedure Code, Sec. 258, as amended by Act VII of 1888—Payment out of Court—Payment not certified to Court—Proof of such payment for the purpose of determining the question of limitation.

Under Sec. 258 of the Code of Civil Procedure (as amended by Act VII of 1888) as there is no time fixed within which the decree-holder is bound to certify a payment made out of Court, such payment may be certified at any time. And although such payment, until certified, cannot be recognized by a Court executing a decree as a payment or adjustment of the decree, it is still open to the Court to take evidence about the payment in order to determine whether an application for execution is barred by limitation. (21 Cal 512 followed.) **Tukaram v Babaji. P J 1895, p 422; 21 Bom 122.**

Notes.—Fol: 23 All 36.

2328—C P C O 21 r 2=S. 258 of 1882—Agreement to pay by instalments.

A decree passed against the defendant in a suit, dated 13th March 1877, directed "that the plaintiff should recover the decree-money by instalments, agreeably to the term of the deed of compromise, and he in case of default should recover in a lump sum." The compromise mentioned in the decree provided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 Fusli, the first to be paid on the 27th May 1877 (1281 Fusli), and the remaining nine instalments on Jaith Puranmashi of each succeeding Fusli year. On the last September 1883, the decree-holder applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and then claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognized by the Court as they had not been certified. *Held* that recognition of such instalments was not barred by the terms of s. 258 of the Civil Procedure Code (4 All 316, and 4 B L R F B 130, followed.) **Zahur Khan v Bakhtawar. 7 All 327.**

Notes.—Not Fol 12 All 569. Fol: 17 All 42.

10 APPEAL AGAINST ORDERS IN THIS SECTION.

(1) Appeal against exparte order.

2329—C P C O 21 r 2 (=Civ Pro Code, 1882 s. 258).

An *ex parte* order certifying payment, on the application of the judgment-debtor, is governed by s. 258, Civil Pro Code, and can be set aside. An appeal lies from an order dismissing or rejecting an application for re-opening the case by cancelling the *ex parte* order. (10 Bom 433, 11 Bom 57, 11 Mad 319, Ref.) **Ma Shwe I v Sitamparam Chetty U B R 1897—1901, Vol II, 254.**

(2) Revision—Error of law—Substantial justice not done.

2330—C P C 1908 O 21, r (2) —Uncertified payment—Court cannot allow it to be proved in execution.

In execution of a decree, the Court should not allow the judgment-debtor to prove those payments which had not been certified under O. XXI, r 2 of the Code, within the prescribed period.

The High Court will interfere in revision, where the lower Court has been guilty of an error of law and substantial justice has not been done in the case. **Janki Prashad v Thakur Dass Mukherjee. 13 Ind Cas 12.**

(10) Appeal against orders in this section —Contd.

(3) Chief Court can interfere in revision.

2331—C P C O 21 r 2=(1882 s. 258).

Held that a suit by a judgment-debtor to declare that the decree against him was satisfied by an uncertified adjustment out of Court, and that the decree can no longer be executed is maintainable, even during the pendency of execution proceedings started in the face of the uncertified adjustment.

Where the lower Court held that such a suit was not maintainable and dismissed the suit, *held*, that the Chief Court can interfere in revision. (21 Cal 437, not Fol. 23 Bom 502; 3 All 538; 21 Mad 409; 18 Mad 26; and 26 P R 1908 (F B), Ref. 75 P R 1890 (F B) Fol. and Expl.) **Diwan Sing v Amur Singh. 16 P R 1910 =18 P W R 1910=5 Ind Cas 814=62 P L R 1910.**

(4) Objection—Certificate to payment was wrong—Second appeal—Finding of fact.

2332—C P C O XXI, r 2—Certified payment —Objection by judgment-debtor that the certificate as to payment was wrong—Burden of proof -Second appeal-Finding of fact.

A decree-holder realized a certain portion of the decree from one of the judgment-debtors and had it certified by the Court in accordance with law. Subsequently, one of the judgment debtors challenged the correctness of this certificate. *Held*, that it was for the judgment-debtor, who so challenged the correctness of the certificate, to prove that it was wrong.

Where a District Judge, in arriving at a certain finding, has been wrongly influenced by his review of the burden of proof, his finding is not a good finding in law and may be set aside in second appeal. **Musammat Saltanat Jahan Begam v Thakur Jaswant Singh, 12 Ind Cas 580.**

(5) Subsequent reversal of decree on appeal—Application by defendant for refund of money paid in satisfaction

2333—C P C O 21 r 2 (1908)=(1882) s. 258.

Where a decree has been reversed, a payment

(10) Appeal against orders in this section —Concld.

under it, whether certified or not, can only be regarded as made without consideration and entitling the defendant to have it restored, his claim not being barred under s. 258 of the Civil Procedure Code.

Vasudev Gobind v Vishnu Vithal Mule. P J (1887) 131=11 Bom 724.

11 MISCELLANEOUS CASES.

(1) "Decree-holder"--General Clauses Consolidation Act.

2334—C P C O 21 r 2=S. 258—Execution of decree.

Regard being had to the General Clauses Consolidation Act (1 of 1868), the word "decree-holder" in s. 258 of the Civil Procedure Code, 1882, should be read in the plural. **Tarruck Chunder Bhuttacharjee v Dinendro Nath Sanyal 9 Cal 831, 12 C L R 566.**

Notes—Fol: 15 Mad 343. Ref. 18 Mad 464; 35 Mad 131 F B; (1904) W N 34; 36 All 334.

(2) Judgment debtor.

2335-C P C O 21, r 2=(1882—S. 258)

The word "judgment-debtor" in S, 258, C P C includes persons claiming through the judgment-debtor or in his right e g an assignee from the judgment-debtor of the equity of redemption after decree. **Panduranga Mudaliar v Vythilinga Reddiar. 17 M L J 417=30 Mad 537.**

(3) Subsequent payment of rent by defendants not a payment under decree, but under the tenure.

2336—C P C O 21 r 2=S. 258 of 1882-Landlord and tenant—Mirasi tenure declared in a decree—Subsequent payment of rent by defendants not a payment under decree but under the tenure, and so need not be certified under Sec 258 of the Civil Procedure Code.

The plaintiff sued the defendants to recover possession of certain land. The defendants pleaded they were *mirasi* tenants and entitled to possession as long as they paid the rent. The suit was compromised, and by a consent-decree it was declared that the defendants held by

C P C (1908) O 21 r 2=(1882, S. 258) -Contd.

(11) Miscellaneous cases—*Concld.*

mirasi tenure, and they were directed to pay rent "as before" or in default the plaintiff should take possession. The plaintiff afterwards applied in execution for possession alleging that the rent had not been paid. The defendants pleaded that it had been paid and the plaintiff rejoined that, even if it had been paid, the Court could not recognize the payment, as it had not been certified under Sec 258 of Civil Procedure Code.

Held, that under the circumstances the rent when paid [redacted] to be deemed [redacted] paid under the *mirasi* tenure and not under the decree, and, therefore, Sec 258 of the Civil Procedure Code did not apply, and payment need not be certified. **Kedari v Gajai P J 1893, p 460; 18 Bom 690.**

(4) Payments made into Court in execution of decree.

2337.—C P C O 21 r 2=S 258 of 1882.

S 206, Act VIII of 1859, does not bar a suit brought to recover money paid into the Collectorate as Government revenue, although the person on whose behalf the money was paid had an Act X decree against the person paying the money, as the entire amount of the decree [redacted] eventually recovered by taking out execution of the whole decree. **Mohima Chunder Ghose v Nobinchunder Adhikaree. 8 W R 449.**

C P C—O 21 r 2—Adjustment of a decree—Right to sue:—See C P C S 47 (1908). Case No (664). **3 All 533.**

C P C—O 21 r 2—Adjustment of a decree. See C P C (1908) S 47. Case No (665). **3 All 538.**

C P C—O 21 r 2—Payment twice over—Suit for recovery of that amount—Maintainable. See C P C (1908) Sec 47. Case No. (585) **[redacted] A L J 475.**

C P C (1908) [redacted] 21 r 2—Application to certify payment under S 258 C P C—See C P C (1908) S 47 Case No (780) **9 W N 95**

—O 21 r 2—Part satisfaction of decree out of Court. See C P C (1908) Sec 47. Case No (681). **17 Bom 23.**

C P C (1908) O 21 r 2=(1882, S.258) -Concld.

C P C—O 21 r 2—Fraud—Cause of action—Regular suit. See C P C (1908) S 47. Case No (587) **10 Cal 354.**

C P C (1908) O 21 r 2—Payment not certified within time, how proved. See C P C (1908) S 47. Case No (184). **11 C L J 91.**

C P C (1908) O 21 r 2—Satisfaction of decree not certified—Suit for declaring that decree is satisfied, maintainability. See C P C (1908) S 47. Case No. (185) **[redacted] C W N 395.**

C P C (1908) O 21 r 2—Satisfaction of decree not certified owing to decree—holder's fraud—Application after time to have certified. See C P C (1908) S 47. Case No. (182) **12 C W N 485.**

—O 21 r 2—Part satisfaction of decree out of Court. See C P C (1908) S 47. Case No. (682). **15 Mad 302.**

—O 21 r 2—Applications made by judgment-debtor. See C P C (1908) S 47. Case No. (217) **23 Mad 377.**

—O 21 r 2—Certifying part payment-Suit for declaration that the decree has been satisfied S 244 bar.—See C P C (1908) S 47. Case No. (781) **5 M L J 146.**

C P C (1908) O 21 r 2—Adjustment of a decree—Right to sue. See C P C (1908) S 47. Case No (668) **8 M L J 51.**

—O 21 r 2—Sanction of Court—Absence of sanction, effect of decree—Entry of satisfacfion. See C P C (1908) S 47. Case No (683). **14 M L J 359.**

—O 21 r 2-Adjust between parties-Jurisdiction of Court to deal with. See C P C (1908) S 47. Case No (424.) **3 M L T 202.**

C P C (1908) O 21 r 2, cls (2) and 3—Adjustment of Court—Not certified to Court. See C P C (1908) S 47. Case No. 161. **13 Ind Cas 63.**

C P C O 21 r 3.

Notes:—This rule is new. The committee have inserted this rule to provide for cases, which they are told are not uncommon, of an estate being situated within the jurisdiction of two or more Courts. There are decisions on this

C P C (1908) O 21 r 3-*Concld.*

point, but they are not harmonious, and the committee think it well to determine the law definitely "—*See the Report of the Special Committee.*

C P C O 21 r 3—Attachment of salary or allowance of public officer or servant of Railway Company a local authority. **See** C P C (1908) O 21 r 48, Case No. (2521)
14 C L J 228.

C P C O. 21, r. 4=(1882, S. 223)

—Notice to show cause against execution in certain cases. **See** C P C O 21 r 22 Case No 2464.
12 C W N 897.

—O 21 r 4—. **See** C P C (1908)S 39. Case No (129).
26 All 361.

—O 21 r 4. **See** C P C (1905) S 38. Case No (124).
28 Cal 238.

—O 21 r 4. **See** C P C (1906) S 38. Case No (125).
34 Cal 576.

C P C O 21 r 4. See C P C (1905) S 38. Case No (126).
26 Mad 258.

—O 21 r 4. **See** C P C (1908) S 38. Case No. (123).
31 Mad 537.

C P C (1908)- O 21 r 4. **See** Case No (127)
31 All 1.

—O 21 r 4—Appeal—Rent decree, application for transfer of decree rejecting application.

See C P C (1908) s. 47. Case No. (493).
8 C W N 575.

C P C O. 21, r. 5=(1882, S. 223)

—O 21 r 5—Appeal--Rent decree, application for transfer of decree rejecting application.

See C P C (1908) s. 47 Case No (493).
8 C W N 575.

—O 21 r 5

See C P C (1908) s. 2 cl. 14. Case No (56)
31 Cal 731.

(2) C P C (1908) s. 39. Case No (139).
26 All 361.

(3) C P C (1908) s. 38. Case No (128)
22 Cal 375=8 C W N 575= 55 P R (1904).

C P C (1908) O 21 r 5=(1882, S. 223) —*Concld.*

(4) C P C (1908) s. 38. Case No (124).
28 Cal 238.

(5) C P C (1908) s. 38. Case No 125.
34 Cal 576.

(6) C P C (1908) s. 38. Case No (126)
26 Mad 258.

(7) C P C (1906) s. 38. Case No (127)
31 All 1.

(8) C P C (1908) s. 38. Case No (123).
31 Mad 537.

C P C O. 21, r. 6=S. 224 of 1882.

Procedure where Court desires that its own decree shall be executed by another Court.

2338-C P C O 21 r 6=1882 Ss. 258.224 (1859, s. 285) cl. (c)—Meaning of the words " a copy of any order for the execution of the decree. "

The words " a copy of any order for the execution of the decree " in s. 324 cl. (c), of the Code of Civil Procedure (Act XIV of 1882) mean a copy of any subsisting order. **Hathibhai Nahansa v Patel Bechar Pragji.**
13 Bom 371.

C P C (1908) O 21 rr. 6. 7. 8, 9, S. 42= 1882. Ss. 224, 225, 226. 227. 228.

See Execution of decree—Transfer of decree for execution &c.

C P C O 21 r 7=S. 225 (1882).

Notes:—This rule corresponds to s. 225 C P Code 1882, with the omission of the words "*or of the jurisdiction of the Court which passad it* " which occurred in the old section.

"The words "*or of the jurisdiction of the Court which passed it*" have been omitted. In our opinion the Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it "—*See the Report of the Select Committee.*

C P C (1908) O 21 r 7 = (1882 S. 225) —Concld.

—O 21 r 7—Decree - Execution—Court to which a decree is sent for execution—Executing a decree—Jurisdiction of the first Court.

See C P C (1908) s. 47 Case No (56!)
28 Bom 378.

C P C O 21 r 2. = S 226 (1882).

Notes:—This rule corresponds to s. 226, C P Code, with some modifications. The words "*be transferred for execution to any subordinate Court of competent jurisdiction,*" have been substituted for the words "by any subordinate Court which it directs to execute the same."

C P C (1908) O 21 r 10. = S.230 (1882) Application for execution.

See cases under:—

(1) Execution of decree – Application for execution, and powers of courts.
(2) Execution of decree—Joint Decrees, Execution of and liability under.
(3) Limitation Act, 1877 Art. 179 (1871 s. 167; 1859, s. 20)—Joint decrees.
(4) Limitation Act, 1877 Art. 180.
(5) Limitation Act (1908) Arts 181, 182
(6) Transfer of Pro act 1882 Ss. 88, 90.

—O 21 rr 10, 21 = Ss 230, 248.

See Mesne profits—Assessment in execution and suit for mesne profits. **6 C L J 462.**

—O 21 rr 10, 21, s. 48 = S. 230 (1882).
See Right of suit. **7 M L T 143.**

—O 21 rr 10 2, s. 48 = S. 230 (1882)
See Resjudicata. **11 O C 220.**

—O 21, r 10, 21 S 48 = 1882, s 230.

See Execution of decree—Transfer of decree for execution. **31 P R 1887.**

—O 21 r 10. 21 = 1882, s 230.

See Execution of decree—Transfer of decree for execution &c. **1887 P J 328.**

C P C O 21 rr 10, 21 S. 48 - Decree for payment of money and in default for sale of property —Construction—Execution of decree. **9 A L J 79.**

C P C (1908) O 21 r 10 = (1882 S. 230) —Contd.

2339A-C P C O 21 rr 10, 21 S.48 (1882, S.230) —Execution of decree—Limitation—Decree for money.

A decree for recovery of money by sale of specific property is a decree for money within the meaning of S. 230 of the Civ. Pro Code. (28 Mad 224 and 473. Fol: 16 All 418; 25 All 541; 24 Cal 473; 25 Cal 580; 27 Cal 285. Not Fol:)

Ram Gopal v Teja Singh **121 P L R 1908.**

2340—C P C O 21 r 10, Ss. 92 93: 48 (1882 Ss. 230, 539)—Religious Institution —Decree directing performance of puja and the giving of honours &c, according to usage—Nature of the decree—Whether executable,

Where in a suit against the trustees of a religious institution the decree directed among other things the performance of puja and the giving of honours etc. according to the usage of the institution.

Held that this portion of the decree must be regarded merely as declaratory and is incapable of execution by the Civil Courts, though in a suit properly framed for the purpose the trustee may be removed from this offence if he failed to do his duty with regard to this matter. (5 Bom 80: 3 M I A 35) followed 18 Cal 448 P C Referred to.)

Janakirama Reddi v Thiruyenkada Ramunuja Chari **2 M L T 94.**

2341—C P C O 21 rr 10, 21 S. 48—Decree—Execution—Limitation—C P C S. 239 (b).

The plaintiff obtained a decree in the Amreli Court (H H the Gaekwar's territory) against the defendants for Rs 6, 727 on the 17th July 1893. An application to execute that decree was made in 1894. A second application for the purpose was made on the 10th July 1905, wherein the prayer was for attachment of whatever moveable property of the defendants that might be found at whatever place within the jurisdiction of the Amreli Court. The Court made the order of attachment. Subsequently on the plaintiff's application, the decree was transmitted for execution to the High Court of Bombay on the 25th July, 1909. The plaintiff applied to the High Court, on the 15th October, 1909, to execute the decree by attaching the moveable property of defendant No. 2 in Bombay. The defendant No 2 objected that the application was barred by the provisions of S. 48 of the C P C (1908).

Held that the plaintiff's application to the High Court was a substantive application with regard to the property in Bombay which was not the subject of any previous application and that, having been made more than twelve years after the date of the decree, it was barred by the provisions of s. 48 of the C P C (1908). (15 Bom 28 Dist:). **Jeevandas Dhanji and Ranchoddas Chaturbhai.** **12 Bom L R 844= 8 Ind Cas 168.**

2341A —C P C O 21 r 10 (S 331) –Question of jurisdiction if raisable:

A question of jurisdiction cannot be raised in an application under S, 311 C P C. **Bihari Singh v Mukat Singh (1904) 3 A L J 140.**

C P C O 21 rr 10, 21, S. 48 –Decree o Presidency Small Cause Court Execution application presented to City Civil Court–S. 48 not applicable. **10 M L T 75.**

2342-C P C O 21 rr 10, 21, s 48=(1882 S.230) —Court having jurisdiction to entertain application—Decree of additional subordinate judge's court—Removal of the Court—Removal of the court and subsequent appointment of another Court.

A decree was made by the Court of an additional Sub-ordinate Judge. Subsequently, another additional Subordinate Judge was appointed.

Held, that application for execution of the decree passed by the former additional Subordinate Judge must be made to the permanent Subordinate Judge. **Tara Chand Marwari v Ram Nath Singh** **4 C L J 473.**

2343—C P C O 21 rr 10, 21 s. 48: O 21 r 17 (1882—Ss. 230,245)—Unverified petition for exe-

cution—Return for amendment—No saving of the period of limitation of twelve years.

An unverified petition may be returned for amendment under S. 245 C P C but the fact that it is so returned and represented after being amended does not prevent the operation of the limitation of twelve years under S. 230 C P C. Where, therefere on the last day of the twelve years' period an unverified application was made for execution by one who did not produce his power of attorney and the petition [illegible] returned for amendment under S. 245 and [illegible] amended within the time allowed by court, and when re-presented was more than twelve years after the date of decree. *Held*, that the execution application was barred by limitation.

Thathachariar v Venkatesa Tawker 12 M L J 435=26 Mad 101.

2344—C P C O 21 r 10, S.230—Limitation—Decree barred by lapse of 12 years—Application for transfer of decree—Application for execution —Continuation of proceedings.

An application for execution can, in no [illegible] of the words, be regarded [illegible] an application in continuation of an application for transfer of [illegible] decree from one Court to another. In order that an application may be [illegible] continuation of another application, it is necessary that the two applications must be of the same nature, and the application for transfer being an application of [illegible] entirely different nature from that for execution of a decree does not suspend the operation of S. 230 of the Code of 1882. (20 All 78 Appl; 6 A W N 137 Dis). **Khetpal v Tikam Singh 9 A L J 365.**

2345—C P C O 21 rr 10, 21 S 48 =(C P C 1877 S. 230)—Application for execution to wrong Court—Limitation.

On the 18th November 1879, within three years from the passing of Act X of 1877, the appellant, who held [illegible] decree against the respondent, applied under S.230, C P C for its execution. But he applied to the wrong Court, and [illegible] consequently referred to the proper Court to which he applied on the 15th May 1880. *Held* that the proceedings taken by the appellant in the wrong Court were good and valid for the purposes of limitation, and [illegible] that application was not granted, the bar of the 3rd paragrph of s. 230, did not apply. **Maharaja Radha Prasad v Indras Kuar.** **A W N (1882) 91.**

C P C (1908) O 21 r.10=(1882)S.230) -*Concld.*

—O. 21 r 10

See also cases under

(1) C P C O 21 r 21.

(2) C P C (1908) S. 48.

—O 21 r 10—Application to be made to Court holding assets prior to their realization.

See C P C (1908) S. 73 Case No. (1060 e)
L B R 1900—1902 Vol I, 121.

—O 21 r 10

See C P C O 21 r 17. Case No. (2453)
12 M L J 435

– O 21 r 10—Applicability and Scope of.

See C P C O 21 r 2. Case No. 2194.
28 Mad 473.

C P C O 21 r, 11.

Notes.—Sub-rule (1) corresponds to section 256 of the Code, with several additions and alterations, as will appear on a comparison with [illegible] 256 of the old Code.

"The committee have omitted the limitation imposed under the existing Code on oral applications for immediate execution. They see no reason why this limitation should be preserved."—*See the Report of the Special Committee.*

The material changes introduced in Sub-rule (1) are:—(1) Substitution of the words, *for the payment of money*, for the words "passed for a sum of money only;" (2) omission of the words "and the amount decreed does not exceed the sum of one thousand rupees," and of the sentence "issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits;" and (3) the addition of the words *"arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court"*.

The expression "*decree for payment of money*" does not include mortgage-decree.—*See the Report of the Select Committee* at page XXXVII and notes under rule 20 of this Order.

See cases under:—

(1) Execution of Decree—Application for Execution and Powers of Court.

C P C (1908) O 21 r 11=(1882 Ss.235, 256)-*Contd*

(2) Limitation Act, 1877, Art. 179—Nature of Applications—Irregular and Defective Applications.

(3) Practice—Civil Cases—Execution of Decree, Application for.

2346—C P C—O. 21,rr. 11 (2),22 (1882 C. P. C. Act XIV of 1882, Ss. 234, 248)—Party appellant —Test Guardain ad litem—Appointment, how long continues—Court of Wards Act (IX of 1879 B.C.), ss.5, 35, 51—Property not taken charge of —Court of Wards—Guardian.

Where a person is named as the guardian *ad litem* in an application for execution and notice under s. 248 of the C. P. C., is issued upon him [illegible] such guardian, it must be presumed that he has been appointed guardian by implication by the Court; his appointment subsists [illegible] long as the *lis* is pending and until it is formally revoked by the Court.

When the manager under the Court of wards has not taken possession of a certain property, the Court is not in charge of such property and cannot deal with it and in a litigation with respect to such property, the manager of the Court of Wards need not necessarily be made the guardian or next friend of the ward. (14 Cal 204, 15 I A. 195=16 Cal. 40, 32 I A. 182=30 Cal 1021, 24 All 383, [illegible] All, 137, 14 All 35, 22 Mad 187 Ref.)

Krishna Pershad Singh v Gosta Behari Kundu. **5 C L J 434.**

2347—C P C—O. 21 r 11 (2)=s.235—Application for execution of decree—Adjustment of decree.

Under [illegible] 235 of the Code of Civil Procedure, 1882, the decree-holder of the party who applies for execution is bound to state in his application any adjustment between the parties after decree, whether such adjustment has or has not been previously certified to the Court. (*2. Mad, 216*, followed.) **Qneen-Empress v Bapuji Dayaram.** **10 Bom., 288.**

Notes—Ref 11 Bom 6 F B.

2348—C P C O. 21, r. 11 (2) (F)=S. 235 and Sections 245, 269, 325—Execution of decree—Application for attachment and sale

C P C (1908) O 21 r 11=(1882 Ss.235, 256)-*Contd.*

Subsequent application for arrest of judgment-debtor—Form of application—Property duly attached and deposited with care taker—Disappearance of attached property—Right of decree-holder to proceed against person of judgment-debtor.

Held, that where a formal and legal application for execution of a decree has been made within time in accordance with the requirements of Section 235 of the Civil Procedure Code and has been registered in Court under Section 245 of the Code and such application was for attachment and sale of specific property, the decree-holder, if such attachment has been duly effected, but the decree has not been satisfied by sale of the property attached must, if he wishes to apply for satisfaction by the arrest of the judgment-debtor, apply in accordance with the provisions of Section 235 of the Code.

Held further, that if moveable property of the judgment-debtor, amply sufficient to satisfy the decree, is attached and made over by the attaching officer to a care-taker, under the rules framed under Section 269 of the Code, and is subsequently not forthcoming from the custody of the care-taker, who is himself missing, the decree-holder cannot further execute his decree against the person or property of the judgment-debtor, other than that attached and made over to the care-taker, unless it be proved that the judgment-debtor was a party to the disappearance of the property attached. **Bhana Mal v Ganpat Rai.**

21 P R., 1899.

2349—C P C—O. 21, r. 11 (2)=S 235 (8)—Application defective under s. 235 (g) C. P. C.

In an application for execution of a decree, under which interest was due, the decree-holder deliberately omitted to state the interest then due, and the decree-holder though invited to amend the application did not do so, and it was eventually struck off for want of prosecution. *Held*, with reference to section 235 (g) of the Code of Civil Procedure, that the application was not made "in accordance with law" within the meaning of Art. 179, (4), sch. ii, of the Limitation Act (XV of 1877). **Nathu Rai v Tufail Ahmad.**

10 W N 98.

C P C O 21 r 11 (2) (j)—Execution of rent decree below Rs. 500—See.

9 Ind Cas 240.

C P C (1908) O 21 r 11=(1882, Ss.235, 256)-*Contd.*

C P C O 21 r 11 (2) (j)—Execution application not specifying mode of assistance from Court—Effect—Procedure

11 Ind Cas 696.

C P C O 21 r. 11 (j) (i)—Application for possession by mortgagor who has obtained a decree for redemption, form of

4 L B R 83.

2350—C P C O 21, r 11 (2)—Mortgage decree—Sale of the property after the usual period of six months—Personal liability for the unpaid balance—Mortgage decree should only reserve liberty to apply for decree under S 90, and not order recovery of balance personally-Attachment of other property for recovering balance—Son born to mortgagor after the sale of the mortgage property but before the sale of the other property under the personal decree—Son entitled to have exempted his share in the propery from sale.

On the 8th March, 1902, a decree on a mortgage was passed in favour of a certain person directing that the mortgaged property should be sold, on failure to pay the money within six months, and that, if the sale proceeds were insufficient to pay off the amount, the balance was to be recovered from G personally. In June, 1903, the mortgage property was sold in execution of the decree. On the 19th idem, D purporting to proceed under the personal decree for the balance, got attached a house belonging to G which was not comprised in the mortgage.

On the 4th August 1903, the sale was set aside on G's application. G then applied on 17th August, 1903, to have the attachment of the house raised. The Court directed that attachment to be maintained, but ordered that the property should not be sold, until the proceeds were found insufficient.

In september, 1904, G's son V was born.

On the 26th November, 1904, the mortgaged property was again sold: and on the 5th January 1905, D applied for the sale of the house, whereupon V applied to have the attachment removed from his one-half share in the house.

Held, (1) that the decree in so far as it directed personal payment by G, was passed in disre-

C P C (1908) O 21 r 11=(1882, Ss.235, 256)-*Contd.*

gard of the provisions of S 90 of the Transfer of Property Act. It was clear from the words and the section that that direction should have been in a supplement decree, to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under S 90.

(2) that the personal decree was contingent on the ascertainment of & the balance, and would become operative and capable of execution, only when that balance was ascertained. It was therefore, open to V to establish any circumstance which affected the validity of the attachment, as against his interest in the house.

(3) that, therefore, the house, to the extent of V's interest therein, should be released from attachment. **Damodar Sakarchand v Vyanku Gangaram. [illegible] Bom L R 199=31 Bom 344.**

2351—C P C O 21 r 11 (2)=(1882 S. 235 (j)—Execution of decree—Petition specifying a mode of execution not authorised by law—Effect of—Court's jurisdiction to specify legal mode—Appellate Court.

The fact that the petition for execution specifies a mode of execution the decree which is contrary to law does not necessitate the rejection of petition. The Court can order execution in the legal mode, and this can be done by an appellate court even when the original court has wrongly sanctioned the mode unauthorised by law. **Sakar Lal v Bai Parvati Bai. 4 Bom L R 14= 26 Bom 283.**

Notes:—Ref: 33 Cal 306=10 C W N 297= 3 C L J 112.

2352—C P C O 21 r 11=(1882 s. 235)—Application in accordance with law.

Where the Court whose duty it is to execute the decree is not the Court which passed the decree, and an application for execution addressed to the former Court omits to mention the latter Court when stating the particular prescribed by s. 235, C P C 1882, the defect is too trivial to prevent the application from being substantially "in accordance with law." (5 Mad 171; 21 Mad 494, Diss, 3 All 247; F. B; 18 All 384; 10 Bom 108; 22 Bom 732; [illegible] Cal 730; 23 Cal 374; 28 P R 1885; 8 C W N 470, Fol. 30 Cal 699 (707); [illegible] N L R 130, Fol. 10 Cal 541; 25 Cal 594; 16 Mad 142; 17 Mad 76; 23 All 163, Ref.) **Vithal v Gopal Rao. 5 N L R 8= 1 Ind Cas 240.**

C P C (1908) O 21 r 11=(1882, Ss.235, 256)-*Concld.*

—O 21 r 11—Witness-Expenses of witnesses. **See** C P C O 16 r 4. Case (2054). **7 M L J 76.**

—O 21 r 11—Execution application, effect of striking off—Attachment, subsisting removal of. **See** C P C (1908) S. 48. Case No (875). **[illegible] Ind Cas 727.**

—O 21 r 11 (2)—Execution of decree—Power of Court executing transferred decree to implead representative of deceased judgment-debtor—Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court. **See** C P C (1908) S. 47. Case No (203). **70 P R 1897.**

—O 21 r 11 (2)—Limitation **See** C P C (1908) S. 48. Case No (857A) **27 P R 1905.**

C P C (1908) O 21 r 12=(1882) S.236

Application for attachment of moveable property not in judgment-debtor's possession.

2353—C P C O 21 r 12=S. 236—Court-sale—Inaccurate description-Wrong date-No prejudice-Sale, valid-Transfer of Property Act, 1882 S. 135 (old). S 2 (d)—Execution sales—Non-applicability of S. 135 (old).

Where, in a Court-sale the plaintiff purchased a part interest in a bond, the date of which was wrongly given by a clerical error, while all other particulars were correctly given, and none were under a mistake as to what was sold.

Held, that the sale passed a valid title in the bond.

S. 236, Civ. Pro. Code, 1882, only requires a reasonably accurate description.

S. 135 (old), Trans. of Pro. Act, 1882, has, by virtue of S. 2 (d) of the same Act, no application to sales in execution. (30 Cal 699, Dist).

Palaniappo Theyan v Shadogopa Mudaliar 9 M L T 319=9 Ind Cas 729= (1911) M W N 133.

2353A—C P C (1908) O. 21 r. 12=(1882) S. 236 (1859 s. 214).—Investigation of title.—Execution of decree.

C P C (1908) O 21 r 12=(1882, S.236) —Concld.

Neither section 214. Act VIII of 1859, nor section 16, Act XXIII of 1861. contemplated any enquiry before the Court, whether the property belongs to the judgment-debtor or not.

Subjan Bibee v Sariutulla.
3 B L R.. A C.. 413; 12 W. R., 329.

C P C O 21 r 13=(1882 S. 237.)

Application for attachment of immoveable property to contain certain particulars.

Notes —This rule corresponds to para. [illegible] of section 237, C. P. Code. 1882. with several additions, alterations, and omissions. The words, *the same and, in case such property can be identified by boundaries or numbers in [illegible] record of settlement or survey, a specification of such boundaries or numbers*, have been added in clause (a) of this rule. No material change has been introduced in clause (b) except some verbal changes.

Para. [illegible] of s. 237 of the old Code, which required the verification of the list of properties has been omitted from this rule and reproduced as sub-rule (3) of rule 66 of Order XXI, with some amplification.

2354—C P C O 21 r 13=Ss. 237 and 578—Omission to verify inventory of property sought to be attached. Irregularity:—*Held*, that the omission in an application in execution for attachment of immoveable property to verify the inventory of the property sought to be attached in the manner prescribed by S. 237 of the Code of Civil Procedure is an irregularity only and does not vitiate the application. (23 All. 55 foll.) **Nasirun-Nissa v Ghafur-ud-din.** 1905 A W [illegible] 263; 28 All 244

2355—C P C O 21 rr 13. 56, 70=C P C s.237 s. 287—Execution—Judgment-creditor, duty of, to disclose lien on property to be sold—Court duty of—Civil Procedure Code, Secs. 237 and 287.

The effect of ss. 237 and 287 of the Civil Procedure Code plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien (which he must know of) in his application for sale, and on the Court the duty of specifying the same in the proclamation.

Where, therefore, in execution of [illegible] simple money-decree obtained for some of the instalments due on his mortgage-bond [illegible] mortgagee brought to sell property which he held in mortgage, but in his application for execution did not mention his lien on the property for the instalments that were still to fall due.

Held, that the purchaser, if he supposed that he was purchasing the full proprietory title, purchased the property free of the mortgagee's lien. (20 Bom. 290, 13 Bom. 678; 6 Bom. 3; and 5 Bom. 5, referred to.) **Ramchandra Vithuram v Jayram.** 1897 P J, p 81.

—O 21 r 13=S. 237 (1882)

See Execution of decree—Application for execution and powers of Court.

C P C O 21 r 14=S 238 of 1882.

Notes.— This rule corresponds to section 238, C P Code, 1882, with some change of words and phrases. The important change introduced in this rule, is, that under the old section the decree-holder was bound to file with his application, an authenticated extract from the Collector's register; whereas under the present rule, it is not obligatory upon him to file such extract with his application for execution unless and until required by the Court. The language of the old section was *"the application shall be accompanied by an authenticated extract from the register of such office"*

C P C O 21 r 15=S. 231 of 1882.

Application for execution by joint decree-holders.

Notes.—This rule corresponds to section 231, C P Code, with some additions, alterations and omissions. The words *"unless the decree imposes any condition to the contrary,"* have been added in sub-rule (1): The addition seems to have been made adopting the principle laid down in 6 All 69, noted below. The words *"or his or their representatives"* have been omitted, as section 146 of the present Code is intended to supply the omission. The other changes introduced in this rule are mere verbal.

The Committee have omitted the words "or his or their representative". This will be covered by the general clause (S. 146)—*See the Report of the Special Committee.*

C P C (1908) O 21 r 15=(1882 S. 231) -Contd.

See Cases under:—

(1) Execution of decree—Application for execution, and powers of Courts.

(2) Execution of decree—Joint decrees. Execution of and liability under.

(3) Limitation Act 1877, art 179 (1871, s 167; 1859, s. 20)—Joint decrees.

(4) Limitation Act 1877 art 180.

2356.—O P C O 21 r 15=(1882 S. 231) Decree-Discharge of payment to one of the decree holders-Probate and Administration Act—Section 98—Several executors-Discharge of debt by one executor.

Payment made to one of the several decree-holders cannot operate [illegible] discharge of the decree against all the decree—holders (26 All 318 and 26 All 335) followed.

One of the several executors has power to release a debt due to the deceased but that can only be when the debt subsists as a debt and not when it has merged into a decree in favour of all the executors. **Lachman Das v Chaturbhuj Das. 3 A L J 49=28 All 252 =(1906) A W N 17.**

2357.—C P C (1908) O 21, rr 15, 2 (=Civ Pro Code, 1882 ss 231 258)—Power of one of two decree-holders to certify payment of whole decree.—

One of two or more decree-holders cannot, except with the consent of the others, certify satisfaction of the entire decree under s. 258 of the Civ Pro Code, by a payment made out of Court. (4 C L R 70, 2 B L R App 43, 15 Mad 343 [illegible] Cal 831, 26 All 318, [illegible] Agra Misc App 16, Ref; 22 W R 77 Diss.) **Moti Ram v Hannu Prasad 26 All 334=1 A L J 40=A W N 1904. 34.**

Notes:—Fol: 34 P R 1906=93 P L R 1906.

2358.—C P C O 21, r 15, s. 47 (=ss 231 and 244, Civ Pro Code, 1882) — Applications under s. 231 treated under s. 244—Appealability.

Where an order appealed from purported to decide questions to be dealt with under s. 244 of the Code party against whom it is passed is entitled to an appeal therefrom. (23 Mad 517, 28 Mad 127 Foll). **Srimat Bhayankaran Rangacharlu, Srimat Bhayankaran Ranganathacharlu. 2 M L T 307.**

C P C (1908) O 21 r 15=(1882, S.231) -Contd

2359.—C P C O 21 r 15 = (1882, S. 231)—Limitation Act (IX of 1908) S. 7-Minors-Decree-holders-Minors-Application to execute the decree on behalf of some of the joint decree-holders—The application enures for all—Discharge by one decree-holder under [illegible] 231 Civ Pro Code, 1882, or O XXI r. 15, Civ Pro Code. 1908, not one contemplated by s. [illegible] of the Limitation Act of 1877, or s. 7 of the Limitation Act of 1908.

Two minors, represented by [illegible] guardian, obtained [illegible] decree in 1901. Applications to execute the decree were made in 1904, 1905 and 1906. At those dates, one of the decree-holders had attained majority; but the other was a minor. In 1908, both the decree-holders applied to execute the decree as majors. The defendants contended that, the elder decree-holder having attained majority, the applications by the guardian had been as to her unauthorized, and the present darkhast for execution of the decrees was barred as regards her. It was also contended that, as the elder decree-holder was able to give [illegible] discharge, since her majority, for the decretal debt, without the concurrence of the minor, time had run against both under s. 8 of the Limitation Act of 1877, and certainly under s. 7 of the Limitation Act of 1908:—

Held, that though the elder decree-holder had attained majority, the applications made by the guardian as next friend of the younger decree-holder took effect in favour of both; for, by reason of the first explanation of Art. 179 of the Limitation Act, an application made by one of the several joint decree-holders took effect in favour of all,

Held, also, that the contention under s. 7 of the Limitation Act of 1877 or s. 8 of the Act of 1908, was inconsistent with the decisions.

The applicability has not ceased owing to any change in the words of s. 7 of the Limitation Act of 1908 (1895) 20 Bom 383 (1899) 22 All 199. **Mulchand Panachand Gujar v. Kesari Khupchand Gujar. 12 Bom L R 682 =34 Bom 672.**

2360—C P C O 21 r 15-Ss 6, 8=Civil Procedure Code, 1882 ss. 231, 257, 258 and 461-Limitation Act (1877) Ss. 7, and 8, Art 179, Sch 11-Joint decree holders-Last application for execution when some were minors and some majors-Application for execution by minors after attaining age more than 3 years after last barred. Section 8 has no application to joint execution creditors who are not 'Joint creditors' within the meaning of the said section. Section 7 has application only when all the joint execution creditors are under disability at the time when the period of limitation begins to run and not when some of such joint execution creditors are majors and the others minors. (13 Mad 236, 16 Mad 436. app.28 Cal 465. 30 Bom 383,32 All 199.dissented from). The words ' Person entitled to make an application,' mean a person entitled [illegible] of right to make an application in his own right or on his own behalf and not merely [illegible] person entitled to make [illegible] application for [illegible] order in the terms of S. 231, C P C, which however, cannot be asked for as of right but which the court may be empowered to make in the exercise of its discretion. Section 23, C. P. C., has no bearing on the construction of section 7 of Limitation Act.

The general rule laid down in col. 3 para 1 of Art. 179 of the Limitation Act prescribes the starting period of Limitation for an application for execution as the date of decree. This is, however subject to fine exceptions provided in paras 2, 3, 4, 5 and 6 of the same col, (20 Cal 714 dis:)

It is not open to the party who seeks the benefit of [illegible] 7 to select his own starting point without reference to the exceptions laid down in paragraphs 2, 3, 4, 5 and 6.

A joint decree which is not executable as a joint decree by reason of some of the joint decree-holders becoming barred does not become severed so as to become executable as regards the interests of the other joint decree-holders unless by act of parties or by operation of law the interest of one joint decree-holder devolves upon the judgment-debtor when to the extent of such severance it becomes divisible.

Where,therefore, [illegible] joint decree for money was obtained by 3 brothers when all of them were minors and the last application for execution was made when two of them had attained age and the other was still a minor, and no application was made thereafter by the major brothers; but the yongest and the other two elder brothers made the present application within 3 years of the youngest attaining majority but after 3 years from the date of the last application.

Held by the Full Bench.

That the applicant had not 3 years from the date of his majority to execute the decree which he would have had under para 1, cl 3 Act 179, coupled with S. 7 if there was no previous application for execution at all, that the applicant being only one of joint decree holders could not call in aid the benefit of s. 7 of the Limitation Act which would only apply when all the decree-holders were minors at the date of the last application for execution and the execution of the decree was barred by limitation three years having elapsed from the date of the last application. *Per Bhashyam Aiyangar* J. Sections 7 and 8 of Act IX of 1871 had no application to the case of execution applications and though sec, 7 has been modified by Act XV of 1877 so as to include execution applications the scope of S. 8 has not been winded by the present Act, Judgment creditors and sxecution cerditors (meaning respectively those who have claims are merged in [illegible] judgment and those who have obtained levy of execution) are not joint creditors and claimants within the meaning of Sectson 8 and therefore Sec 8 has no application to the case of joint judgment creditors or joint execution creditors.

Obiter-Under S. 257 C P C payment out of court must be made in the case of joint decree-holders to all of them a payment to one of several joint decree-holders is not binding on the others and cannot be recorded as certified under S. 258 unless the decree-holder receiving payment has also been constituted as the agent of the others. *Obiter*-Even where the joint decree-holders are members of an undivided family and one of them is the family manager the latter is not empowered to give a discharge of the decree debt, without the concurrence of the others and is further not empowered to execute the whole decree as of right. The manager is also subject to the provisions of s. 231 C P C which gives only [illegible] discretion to the court to allow any one of joint decree-holders to execute the whole decree on sufficient cause. An order under that section

C P C (1908) O 21 r 15 (1882, S. 231)

—Contd.

will as a general rule be a direction to the applicant for execution to furnish security for the protection of the interests of such persons. If one of the joint decree—holders or if the sole decree-holder is a minor his guardian or next friend will not be allowed under s. 466 C P C to receive any money payable to such minors under the decree without obtaining leave of court and without as a general rule furnishing security.

Perissami v. Krishna Ayyar. 12 M L J 166 =25 Mad 431.

2361—C P C O 21 r 15=(1883) S 232—Assignment of decree—Suit to set aside attachment by assignee—Act X of 1877, Section 232—Absence of written assignment-Objection to attachment by plaintiff on ground of such irregularity.

The assignee of a decree attached in execution as the property of the judgment-debtor certain monies in the hands of a third party. In a suit by one K S against the judgment-debtor and the assignee to set aside the attachment on the ground that the judgment-debtor had no attachable interest in the property in question, it was held by the Chief Court (reversing the orders of the lower Courts) that the judgment-debtor had no attachable interest in the monies whereupon it was contended for the plaintiff that the attachment was null and void with reference to Section 232, Act X of 1877, because the assignment of the decree was not in writing, as contemplated by that Section.

Held, that this objection could not prevail, as for the purposes of the present suit, and more especially in special appeal, the Court was bound to presume that the Court executing the decree had done all things which the law prescribed to be necessary and that an assignment in writing existed, though it did not appear to have been filed.

Held, further that in the present suit it was not open to the plaintiff to set up an irregularity in the execution proceedings which could only be contested as between the execution-creditor and the judgment-debtor, the sole question being one of title, which, if established, would prove that the property in dispute was not liable to attachment as against the judgment-debtor.

Semble, that even the judgment-debtor could not recover back his money from the assignee merely because the execution proceedings were *ultra vires*, unless he could show that he had in some way been defrauded by the transaction.

Tota Singh v. Khan Singh P R 87 of 1880.

—**O 21 r 15**—Counter-petition cannot be treated as an application to certify—When not put in within the time—Art. 174 of the limitation Act.

See C P C (1908) O 21 r 2 Case No:—(2319).

10 M L J 396.

O 21 r 15—Execution of a decree for perpetual injunction—Application.

See C P C O 21 r 32 Case No. 2500.

33 Cal 306.

—**O 21 r 15**—Decree for moiety in favour of defendant—Right of defendant to claim moiety of money realised in execution.

See C P C (1908) S. 47. Case No. (645.)

2 M L J 14.

C P C O 21 r 16=S 232 of 1882.

Application for execution by transferee of decree.

Notes—This rule corresponds to section 232, C P Code, 1884, with some additions and alterations. The important changes in para. 1 of this rule are the addition of the words, "*or if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is*;" and the omission of the words "*if that Court thinks fit*" which occurred in the old section. The above addition seems to have been made to make it clear that transfer of a portion of a decree is legal, as the old section was silent on the point. The decisions on the point are not harmonious, as will appear on reference to the cases noted below under the heading "Transfer of a portion of the decree."

The omission of the words "*if that Courts think fit*"from the present rule, seems to have been made to meet the cases (15 Cal. 446 and 20 Cal. 388) noted below. In those cases it was held that under S 232, C P Code. 1882, the Court had absolute discretion to allow or to refuse execution to proceed at the instance of the transferee.

The changes introduced in paras. 2 and 3 of this rule are not material but they have been made to make the provisions of the present law more clear.

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C P C (1908) O 21 r 16=(1882, S.232) -*Contd.*

(1) GENERAL RIGHTS & LIABILITIES OF TRANSFEREE OF A DECRFE.

(1) Assignee of decree.

2362—C P C O 21 r 16=(1882 s. 232.)

The term mortgagee in *S.* 99 of the Transfer of Property includes a person in whose favour a money decree has been assigned by the mortgagee. **Sambhuram v Mt Khulsambi.**
14 C P L R 35.

(2) Power of Court to stay execution, discretionary and not obligatory.

2363—C P C O 21, r 16, s. 47 (=ss 232, 244 Civ Pro Code (1882)

The appellant sought to enforce a decree on the ground that they were transferees thereof by operation of law. The transfer was disputed and the matter was *subjudice* in another suit. The application for execution was dismissed by the District Munsiff. *Held*, that the last clause of s. 244 of the Code does not make it obligatory on the Court either to stay execution until the right of the alleged transferee is determined by a separate suit or itself to determine the question. The Court has a discretion both under s. 232 and 244 of the Code either to stay execution or dismiss the petition. **Vakulabharana v Rangaiyan Chetty.** **28 Mad 357.**

2364—C P C O 21 r 16=S. 232—Recognition of transfer by Court.

A party to a suit can enforce any decree he may get as a matter of right; but an assignee of such decree can only do so after obtaining the Court's permission, which depends entirely on the Court's discretion. An assignee, therefore, is not in the same position as the original decree-holder, and is not entitled to have the same privileges. **Shama Puddo Dutt v Nobin Chunder Bose.** **15 W R 283.**

2365—C P C O 21 r 16=S. 232—Power of Court to which decree has been transmitted.

The assignee of a decree should apply to the Court which passed the decree, and not to the Court to which the decree had been forwarded under s. 285 Act, VIII of 1859, for execution, for the purpose of being substituted in the place of the original decree-holder. The word "Court" in s. 208, Act VIII of 1859, did not include the Court to which a decree has been transferred for execution. **Sheo Narayan Sing v Harbans Lal.** **5 B L R 497: 14 W R 65.**

C P C (1908) O 21 r 16=(1882, S. 232) -*Contd.*

(1) General rights & liabilities of transferee of a decree—*Contd:*

(3) Omission to give notice of application for substitution of names—Title of assignee.

2366—C P C O 21 r 16=S. 232 (a) C P C—Defective registration—Notice.

The holders of a decree for the sale of mortgaged property transferred the same to M by instruments which were registered at a place where a small portion only of the property was situate. Subsequently M transferred the decree to other persons and the co-transferees applied under s. 232 of the Code of Civil Procedure to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the ground that M's name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to M were inoperative, as the instruments of transfer had been registered at the place where the substantial portion of the mortgaged property was not situate, in accordance with s. 28 of the Registration Act (III of 1877). It appeared that no notice had been issued to M under s. 232 of the Code of Civil Procedure that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held* that the matter involved questions arising between the parties to the decree or their representatives within the meaning of s. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of s. 2, and was appealable as such. *Held* that, even assuming that the judgment-debtor had a *locus standi* to raise the objection that notice had not been issued to the applicant's transferor he had no passable interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for a transfer of names, the objection that the transferor had not been cited under s. 232 was not a substantial one. *Held* that the objection in reference to s. 28 of

(1) General rights & liabilities of transferee of a decree—*Contd.*

the Registration Act, could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force. *Held* that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignor's passing title under the assignment. **Gulzari Lal v Daya Ram.** **9 All 46, 6 W N 287.**

Notes—Fol: 16 All 483.

(4) Certificate, necessity of.

2367—C P C O 21 r 16=S. 232 of 1882.

Under s. 208, Act VIII of 1859, it was not essential that a certificate should in every instance be obtained by a representative before he can be allowed to apply for execution.

Gopal Singh Deb v. Gopalchunder Chuckerbutty, **7 W R 393.**

2368—C P C O 21, r 16=S. 232 of 1882—Succession Certificate Act, 1889 — Execution of decree—Civil Procedure Code, Section 232-Hindu widow assigning decree obtained by her deceased husband—Effect of absence of certificate under the Act of 1889.—

A decree-holder died leaving a widow; she did not take out a certificate under the Succession Certificate Act, 1889, but made an assignment in writing of the decree to N. L.

N. L. proceeded to attach property of the judgment-debtor, who objected that N. L. had no title to execute the decree on the ground that the widow had not obtained a certificate under the Act of 1889 to collect debts due to her husband.

Held, that the objection was well founded. Assuming that the widow was competent without a certificate to assign the debt, she could only assign effectually what right she herself had. She had not the right to execute the decree unless and until she had applied to the Court under Section 232, Civil Procedure Code, for execution of the decree under a transfer by operation of law from the deceased decree-holder. An application by the widow could not be granted unless she produced a certificate under the Act of 1889, Section 4 of the Act prohibiting the Court from acting on an application of the kind without the production of a certificate.—

Lal Chand v. Nand Lal. **37 P [illegible] 1893.**

(5) Right of assignee.

2369—C P C O 21 r 16=S. 232 of 1882.

A person claiming to be the assignee of a decree should apply for recognition of his title to the Court which pronounced the decree, and for leave under s. 208 of the Civil Procedure Code to have his name substituted in lieu of that of the plaintiff. **Ismail valad Ahmed Barucha v Kassam valad Azam Dupli.** **9 Bom H C R 46.**

Framji Rustamji v. Ratansha Pestanji, **[illegible] Bom H C R 49.**

Balkishoon v. Mahomed Tazam Allee, **4 N W 90.**

Kadir Buksh v. Elahi Buksh, **2 All 283.**

See Amar Chundra Banerjee v. Guru Prosunno Mukerjee, **27 Cal 488.**

(6) Assignment of decree.

2370—C P C O 21 r 16=S. 232 of 1882.

S. 208, Act VIII of 1859, put a party, to whom a decree is transferred, into the position of the original decree holder, and entitled him to have the decree executed, as if application were made by the original decree-holder.

Shamanund Surma v. Shumbhoo Chunder Dass, **7 W R 205.**

Notes:—Ref: [illegible] W R 171; 18 All 428 F B.

(7) Benami transfer—Contest between benami transferee and real transferee as to the right to execute decree.

2371—C P C O 21 r 16=S. 232, 244 of 1882—Transferee—Decree-holder's right to execute.—

Where a question arises in execution proceedings as to who is the real transferee of a decree, the Court may, under s. 244, C P C, either decide the question then and there, or refer the parties to a separate suit for a decision thereon.

Notwithstanding the form of the transfer, the real transferee of a decree may apply to execute it under S. 232, C P C.

(1) General rights & liabilities of transferee of a decree—*Contd.*

Once an executing Court, in the exercise of its discretion, decides upon allowing the transferee to execute a decree, it has no further discretion to choose as between the benamidar and the real transferee of the decree. The real transferee must be put on the record in preference to the benamidar. The mere fact that the benami transferee had been allowed to execute a decree under S. 232, C P C, does not debar the real transferee from applying afterwards under the same section to be allowed to carry the further execution of the decree. **Manickam v. Tatayya, 21 Mad 388=8 M L J 48.**

Notes:—Ap: 25 Mad 545. Ref: 17 M L J 391.

(8) Benami transfer of decree for a judgment-debtor.

2372—C P C O 21, r 16=S. 232 of 1882—Assignee of a decree.—

Under section 232 Civil Procedure Code the court has discretion to allow the transferee of a decree to execute it, and an Appellate Court will not interfere with the exercise of the discretion of the court which passed the decree, unless it be shown that the discretion has been improperly exercised.

It is doubtful whether a transferee of a decree can be debarred from executing it on the ground that the transfer is benami for the benefit of a third party. When a decree is transferred to a third party but the consideration is paid or provided by one of several co-judgment-debtors, who does not intend to pay or provide such consideration for the benefit of the nominal transferee, there is no resulting trust under section 82 of the Trust Act, for the trust is void, inasmuch as if allowed to be enforced it will enable one judgment-debtor to recover the judgment-debt from his co-debtors and thus defeat the provision of section 233 (b) Civil Procedure Code. **Waman Rao v. Tekchand, 2 C P L R 45.**

(9) Cross-decrees.

2373—C P C O 21, r 16=S. 232 of 1882.—

Where a party who assigned over a decree was liable under a cross-decree for a considerable sum to the judgment-debtor.—*Held*, that until the respective liabilities of the two parties, had been settled, the Court was justified in refusing to allow one of them to assign the decree to a third party. **Jodoonath Roy v. Ram Buksh Chulungee, 8 W R 202.**

(10) Insolvency—Assignment of insolvent's estate to surety.

2374—C P C O 21 r 16=S. 232 of 1882—Insolvency—Assignment of insolvent's estate to surety—Adjudication set aside.—

An official assignee brought a suit on a debt due to O B S pending the latter's insolvency. The defendant pleaded the payment to the insolvent. His plea was overruled on the ground that payment to the insolvent pending insolvency does not bind the official assignee; and a decree was made against him. The insolvent then made a composition of the debts with his creditors and assigned his property to B in order that B should become a surety to the creditors for the payment of debts due to them. Accordingly the adjudication was set aside and the official assignee was directed to hand over the property to the insolvent. B applied for execution of the decree in this suit against the defendant.—*Held*, the order setting aside the adjudication had not the effect of annulling the decree. It operated in passing the benefit under the decree from the official assignee as representing the creditors to the present applicant and made the latter an assignee under S. 232 C P Code. It was held unnecessary to consider whether there was in fact, pending the insolvency, a payment to the insolvent in discharge of the claim. **Mitter v. Abinash Chunder Dutt, 4 C W N 785.**

(11) Mortgage-decree for, assignable.

2375—C P C O 21, r 16=S. 232 of 1882—Assignment of Decree—Mortgage-decree for Rs. 100 or upwards — Sale by unregistered deed—Validity:—

A mortgage decree for Rs. 100 or more is assignable without registration. **Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya. 12 C W N 625.**

C P C (1908) O 21 r 16=(1882, S. 232) -Contd.

(1) General rights & liabilities of transferee of a decree—Concld.

(12) Placing on record a respondent after time

2376.—C P C O 21 r 16; O 41 r 20=(1882 Ss. 232 559) Placing on record a respondent after time for appealing against him has expired:—

A respondent should not be placed on the record under S. 559 C P C; after the time for appealing against him has expired. The validity of an assignment of a decree cannot be questioned after the assignee has been placed on record as substituted decree-holder. **Ram Ratan Chuckerbutty v Jogghi Chandra Bhattacharya. 12 C W N 625.**

2377.—C P C O 21 r 16=S.232-Purchasers of share in decree.

Quære-Can the purchasers of a share in a decree be added upon the record under Act VIII of 1859 s. 208 as co-decree-holders? **Seetaput Roy v. Ali Hossein. 24 W R 11.**

Notes —Diss 17 Cal 341 Ref: 28 Mad 61.

2378.—C P C O 21 r 16—S. 47=(Ss. 232, 246)—Transferee of decree.

The assignee of a decree, which subsequent to the assignment is appealed against and confirmed by the appellate court without his (the assignee's) name being brought on the record, is an assignee within the meaning of S. 246 Civil Procedure Code, and a satisfaction entered on the decree under the provisions of that section is binding on him though made subsequent to the assignment to him and before his name is brought on the record. **Ramakrishna Aiyar v Narayana Aiyar. 7 M L J 227.**

2379.—C P C O 21 r 16=S. 232.

By decree in S. 232 must be understood such right under the decree as the transferor is entitled to and therefore there is no bar to the alienee of part of a decree applying for execution. **Narayan v Vithal. 1886 P J 287.**

2 RIGHT OF TRANSFEREE BY ASSIGNMENT IN WRITING.

(1) Transfer of Property-Rights of transferee

2380.—C P C O 21 r 16=(1882 S. 232.)

C P C (1908) O 21 r 16=(1882, S.232 -Contd.

(2) Rights of transferee by assignment in writing—Contd.

In the case of a transfer of property whether by sale or by foreclosure of a mortgage the transferee acquires all the rights attaching to such property at the time of the transfer including the right to execute decree obtained by the transferor (11 Bom 368, 16 Cal 347; 21 Mad 353; 16 All 284 *Referred to*). **R B Lala Onkardas v Shahbaz Khan. I N L R 49.**

(2) Transfer under sec. 232 when complete—Duties of executing Court and transferee-decree-holder.

2381—C P C O 21 rr 16, 63 O 38 rr 8, 9=(1882 Secs 232, 273, 486 and 487) —Decree-Attachment before judgment.

The 1st defendant owed money to the plaintiff to discharge which on 28th January 1904 he assigned in writing two decrees in his favour the file of the District Munsif's Court. These decrees were attached before judgment by the sub-Court on 22nd April 1904 in a suit brought by the 3rd party against the 1st defendant. Plaintiff applied for execution in 1905 and the execution applications were dismissed on the ground that the decrees were attached by the Sub-Court, Plaintiff then repudiated the assignment and brought the present suit to recover his original debt. The District Munsif decreed the suit but the Sub-Judge dismissed the same.

Held on appeal by the plaintiff, that the suit is not maintainable as the District Munsif has not dismissed the application on any ground affecting the validity of the transfer of the decrees but simply because he had no power at the time to allow execution. The attachment being made under sec 486, Civil Procedure Code the District Munsif ought to have stayed execution until the attachment was raised. The plaintiff could have applied to the attaching Court for withdrawal of the attachment under sec 487, Civil Procedure Code. By the assignment in writing the property in the decree has passed to the plaintiff. (20 Mad 157 considered, 16 All 483 Ref to), **Sadagopachariar v Raghunatha Chariar. 6 M L T 273=83 Mad 62=3 Ind Cas 938.**

(3) Whether sanction of Court necessary before transferring decrees.

2382—C P C O 21 r 16=(1882 ss.238, 2)-Execution application for by transferee decree-holder

C P C (1908) O 21 r 16=(1882, S.232) —*Contd.*

(2) Rights of transferee by assignment in writing—*Cont'd.*

Held, that a valid transfer of a decree is effected by proper assignment in writing, there is nothing in s. 232, C P C. to make transfers of decrees conditional upon obtaining the sanction of the Court. (16 All 483 Fol 2 Mad 216 Expl).
Abboy Naidu v Muthukrishna Naidu. 2 M L T 93.

(4) Transfer in writing-Right to execution of decree.

2383.—C P C O 21 r 16=S. 232 of 1882.
The transferee of a decree is not entitled to have execution as of right like the original decree-holder, if, however, the transfer be by assignment, and in writing, s. 232 of the Code of Civil Procedure, Act XIV of 1882 enables the transferee to apply for, and the Court to proceed to execution in the manner therein provided. **Javermal Hirachand v Umaji Hayabati 9 Bom 179.**

Notes.—Fol 15 Bom 307. Ref: 9 Bom L R 728, 31 Bom 462, 10 C L J 396.

2384.—C P C O 21 r 16=(1882 Sec. 232)—Transfer of decree—When complete—Whether sanction of the Court necessary.

The transfer of a decree becomes complete on the date of assignment of it in writing and it is not conditional upon the Court permitting the transferee to execute the decree. S. 232 of the Code recognizes that the completion of the transfer does not depend upon the sanction of the Court as it begins with the words "if a decree be transferred by assignment in writing."
Subba Naicker v Saminatha Aiyer 5 M L T 260=1 Ind Cas 353.

2385.—C P C O 21 r 16=(1882 Ss. 232, & 2) —Application by transferee of decree-holder—Limitation Act Art 179.

An application by the transferee of a decree for execution under S. 232 of the Code is an application by a decree-holder and is therefore in accordance with law.(14 M L J 393 Fol,20 Cal 388 Dist). **Subbaya Chetty v Rangaswamy Chetty 2 M L T 339.**

(5) Oral transfer of decree cannot be recognised-Tranferee-No 'locus standi'.

2386.—C P C O 21 r 16=S. 232, 1882—His application—A nullity—Not a step-in aid of execution.

C P C (1908) O 21 r 16=(1882,S.232) —*Contd.*

(2) Rights of transferee by assignment of writing—*Concld.*

S. 232 Civ Pro Code 1882 means that the Court can recognise an assignment in writing or a transfer by operation of law, and cannot recognise any other mode of transfer, *e g* an oral transfer.

An assignee of a decree, under an oral transfer, has no *locus standi* to apply for execution.

An application by such assignee is not in accordance with law nor is it a step-in aid of execution. The Court has no power to recognise such an application.

The argument that the Code should be ignored in considering this question because the Code was enacted after the Limitation Act came into force is untenable (15 Bom 307, Ref:19 Cal 482, 16 All 26, Dist: 20 Cal 755 Not, Foll). **Ramanathan Chettiar v Sokkanatha Gowndan. (1911) 2 M W N 559.**

2387.—C P C O 21 r, 16=s. 232—Assignee of decree under oral assignment —Right to execute decree—Plea of fraud raised in execution-proceedings. —

An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree, but, as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion under s 232 of the Code of Civil Procedure (Act XIV of 1882), whether to recognize such assignment or not. When an assignee of a decree applied for execution, and the judgment-debtors contended that the decree sought to be executed had been obtained by fraud and was, therefore, a nullity and incapable of execution,—*Held* that it was not open to the judgment-debtors to raise the defence of fraud in the course of the execution-proceedings. **Parvata v Digambar 15 Bom 307.**

Notes.—Ref: 9 Bom L R 728, 31 Bom 462.

(3) RIGHTS OF TRANSFEREE BY OPERATION OF LAW.

(1) Right of procedure Execution under.

2388—O 21 r 16=S 232 of 1882 Transferring a decree for execution by operation of law.

C P C (1908) O 21 r 16=(1882 S. 232) -Contd.

(3) Rights of transferee by operation of law—*Contd.*

C P Code 1882 s 232—Procedure—Execution under Bengal act (VII of 1869) and Act (VIII of 1885). The mother of a deceased person took a probate of his will. At the instance of the minor son of the deceased the mother's probate was revoked. While the mother was executrix, she had obtained a decree for rent under Bengal act VII of 1869. The minor applied for the execution of the decree. *Held*—the minor can execute the decree, his succession to the estate of his father being a succession or transfer by operation of law within the meaning of S 232 C P Code *Held* also that the mode in which the decree was executed under the old rent act Bengal act VIII of 1869 was, in so far as it was a right at all that belonged to the judgment creditor, not a private right, but a mere right of procedure and the execution was therefore to be governed by Act VIII of 1885.

Umasoondury Dassy v. Brojonath Bhuttacharjee. 16 Cal 347

Sathurayar v Shanmugam Pillai. 21 Mad 353.

(2) Right to appeal against order refusing execution.

2389—C P C O 21 r 16=S 232—Transfer of decree by operation of law—Representative of original decree-holder—Civil Procedure Code (Act XIV of 1882), s. 244—

R died in May 1859, leaving his property to his executors in trust for the appellant P, and he directed that the property should be assigned by them to the appellant as soon as he came of age In August 1868, the executors filed this suit against L as manager of certain landed property belonging to the Hallai Bhattia caste, and known as Mahajan Wadi, to recover certain loans made by them as executors to him as manager of the said wadi. On the 11th May 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant P. By the deed of assignment they assigned to him (*inter alia*) " all moveable property, debts, claims, and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee, P, a party to the suit, which proceeded without amendment. On the 23rd January 1873, a decree was passed for the plaintiffs on the record for Rs 31,272-13-5, and it was declared that the said sum should be a first charge on the rents and income of the said wadi. Subsequently to this decree, L opend an account in the name of the appellant P, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November 1884. None of these payments were certified to the Court. In 1885 the respondent V was appointed to the office of manager of the Hallai Bhattai caste in the place of L, the original defendant in the suit. On the 4th January 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the said wadi. He claimed to be a transferee of the decree under s. 232 of the Civil Procedure Code. His application was refused by the Judge in chambers. *Held* that the appellant was a transferee of the decree within the meaning of s. 232 of the Civil Procedure Code. The decree had been transferred to him "by operation of law." as such, he was entitled to sue out execution, and was to be regarded as the representative of the original decree-holder within the meaning of cl. (c) of s. 244 of the Civil Procedure Code and had a right of appeal against the order of the Judge in chambers refusing execution. **Purmanandas Jiwandas v Vallabdas Wallji 11 Bom 506**

Notes—Fol 21 Bom 122, 16 All 483. Ref: 2 Bom L R 887, 1 All 42.

2390—C P C O 21 r 16=(1882 S 232)-Appeal-Hearing—Judgment reserved—Death of party—Representative not brought on record—Delivery of judgment—Right of representative to appeal.

Where after the hearing of the appeal but before delivery of the judgment the appellant dies the fact that his representative has not been brought and the record is no bar to the judgment being pronounced. The judgment so pronounced relates back to and speaks from the date when judgment was reserved. The representative of the deceased appellant has under such circumstances

C P C (1908) O 21 r 16=(1882 S. 232) -*Contd.*

(3) Rights of transferee by operation of law—*Contd.*

a *locus standi* to appeal from a decree passed in such appeal notwithstanding the fact that he may not have been brought on the record He is not bound under s 232 C P C to apply to the Court which passed the decree. It is enough if he applies to the Court to which he appeals, to be brought on the record as representative. **Raghunatha Thatha Chariar v Venkatesa Tawker.** **26 Mad 101=12 M L J 435.**

(3) Certificate of administration Right to execute decree as transferee.

2391—C P C O 21 r 16=S. 232. Certificate of administration under Bombay Regulation VIII of 1827 s. 7—Holder of such certificate—

A holder of a certificate of administration granted under s. 7 of Regulation VIII of 1827 is a transferee by law of a decree obtained by the deceased within the meaning of s. 232 of the Civil Procedure Code, and is competent to apply for execution of such a decree. **Khanderav Rayajirav v Ganesh Shastri.** **11 Bom 368.**

(4) Transferee.

2392—C P C O 21 r 16=S 232-Hindu son.

Held that in the absence of any proper assignment of the decree a son is not competent in the life-time of his father to apply for the execution of a decree obtained by his father. **Antaji v Durga Prasad.** **4 W N 39.**

2393—C P C O 21 r 16=S 232 of 1882.

When a decree obtained by one member of an undivided Hindu family goes, at partition, to the share of another member, the transfer is not effected by "operation of law" within the meaning of s 232, but by mutual arrangement and so the transferee must obtain a written assignment before he can be allowed to execute the decree. **Govind v Pandu** **1885 P J 195.**

(5) Transferee's rights—Legal representative of a deceased judgment-debtor.

2394—C P C O 21 r 16=S 232—Transfer of decree-Notice of transfer.—

The transferee of a decree stands in the same

C P C (1908) O 21 r 16=(1882 S. 232) -*Contd.*

(3) Rights of transferee by operation of law—*Contd.*

position for getting execution as the transferor. If a decree is transferred by assignment after the death of the judgment-debtor, notice of the transfer, as required by s 232 of the Civil Procedure Code, may be served on the legal representative of the deceased judgment-debtor. The death of the judgment-debtor does not render the transferred decree incapable of execution. **Khushrobhai Nasarvanji v Hormazsha Phirozsha.** **11 Bom 727.**

Notes—Ref 12 C W N 614; 35 Cal 1100.

2395-C P C O.21 r 16=(1882 S. 232)-Legal representative of judgment-creditor—Substitution.

The Civil Procedure Code does not expressly provide for an application for substitution of the legal representatives of one or some of the judgment-creditors. There is no provision which renders necessary the actual substitution of the name of the legal representatives for the validity of proceedings in execution. Section 232 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record. **Jogendra Chandra Roy v Sham Das.** **9 C L J 271.**

(6) Execution of a decree of the agent for Sardars-Rights of transferee of a decree.

2396—C P C O 21 r 16=S. 232 of 1882.

A in 1839 obtained a decree against *B*, a sardar, in the Court of the Agent for Sardars. The decree was executed in the Agent's Court until *B*'s death in 1868. *B*'s status as a sardar under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of *A*'s representatives against the estate of *B*'s sons In 1885, one of *A*'s representatives assigned his interest under the decree to *C* and *D*. Thereupon the transferees *C* and *D* applied to the First Class Subordinate Judge at Ahmednagar to have their names substituted in

C P C (1908) O 21 r 16=(1882, S.232) -*Contd.*

(3) Rights of transferee by operation of law—*Concld.*

the place of the transferor in the execution-proceedings. The Subordinate Judge rejected this application, on the ground that he could not recognize the transfer of the decree either under s. 372 or 232 of the Civil Procedure Code. *Held* reversing the order of the lower Court, that the assignment of the decree-holder's rights to execution in this case was one approved by the law as contained in s 232 of the Code of Civil Procedure. The transferee of a decree gains by the transfer the rights of the transferor. **Vishnu Sakharam Nagarkar v Krishnarao Malhar** **12 Bom 153.**

Notes:—Fol: 17 Bom 162. Ref: 5 C L J 611: 36 Cal 193.

4 TRANSFER OF A PORTION OF A DECREE.

2397—C P C O 21 r 16—Transfer of a portion of a decree—Maintenance-Decree-Validity.

A court executing a decree has power to recognize the transfer of a portion of decree. A transfer of a decree for arrears of maintenance is valid though it be a decree in part. **Venkataramana v Venkatacharlu** **33 Mad 80.**

2398—C P C O 21 r 26; S.47=(1882, Ss. 232 244).—Transferee of decree—Transferee of portion of decree, no transferee;

A person who acquires a partial interest in the rights created by the decree is not entitled to be recognized as the transferee of the decree under s. 232. The assignee's right is only by separate suit and not by execution. **Pasupathy Ayyar v Kothandarama Ayyar** **28 Mad 64.**

Notes:—Fol: 5 P R 1907=40 P W R 1907=33 P L R 1908; Ref: 32 Mad 425.

2399—C P C O 21 r 16=S. 232—Execution of decree by assignee of decree-holder—Execution of mortgage decree by purchaser of portion of mortgaged property.

A decree having been obtained upon a mortgage against two judgment-debtors, the joint owners of a certain mehal, which was subject to the mortgage, and which was declared by the Court to be subject to the decree, in the event of

C P C (1908) O 21 r 16=(1882 S. 232) -*Contd.*

(4) Transfer of a portion of a decree —*Concld.*

default being made in payment of the mortgage-money, the 8-annas share of one of the debtors was, before execution had been taken out, sold at auction under Bengal Act VII of 1868 and purchased by the appellant. Subsequently, the decree-holder having attempted to execute the decree against the share so purchased, the appellant, in order to protect the share which he had bought, purchased the decree himself and proceeded to execute it against the remaining share in the hands of the judgment-debtors *Held* that the appellant, as the transferee of the original decree-holder, was entitled to execute the decree personally against the judgment-debtors, and also, in the event of their making default in paying the amount due under the decree, to proceed against the share of the mehal still in their hands; and, further, that if by reason of it being necessary to sell the remaining share of the judgment-debtors any equity should arise between them and the appellant to have the decretal money distributed over the whole property mentioned by the decree, that equity must be enforced by an independent suit. **Nafer Chunder Mundul v Baikanto Nath Roy** **4 C L R 156.**

Notes:—Ref; 34 Cal 13; [illegible] C L J 573.

2400—C P C O 21 r 16=S. 232—Transfer of part of a decree—Execution by such transferee.

Law does not prohibit the transfer of a portion of a decree. And there is no objection to the transferee of a portion of a decree being allowed to carry on the execution proceedings if the whole decree is executed and the rights of all the interested parties are cared for. (24 W R 11 dissented from.)

Kishore Chand Bhakat v Gisborne & Co. **17 Cal 341.**

Notes:—Fol: 19 Mad 306.

5 APPLICATION FOR EXECUTION BY THE TRANSFEREE.

(1) Question of the validity of an order allowing an assignment of the decree.

2401—C P C O 21 r 16=(1882 s. 232).

The question of the validity of an order, under s. 232 of the Code, allowing an assignment of the

(5) Application for execution by the transferee—*Contd.*

decree is a question to be determined by the Court that passed the decree, has been transferred for execution. (5 Cal 736, 21 Bom. 456, relied on. 7 All. 73 Ref. to.) **Lala Gopal Das v Pandit Prem Nath** **156 P L R 1905.**

(2) Decree, transferee cannot give permission under, to continue execution.

2402—C P C O 21 r 16=S. 232 of 1882.

Held, that the Court to which a decree has been transferred cannot give permission under S.232 of C P Code to continue execution proceedings begun upon the application of a decree-holder, since deceased. Such permission can be granted only by the Court which passed the decree. (27 Cal 488 Ref.); **Nazhat-ud-dawla Abba Hassan Khan v Prince Wala Kadar Husain Ali Mirza** **11 O C 112.**

2403—C P C O 21 r 16 ss. 36, 37=(1882 Ss. 232, 649).-Execution application for where to be made—Transfer of jurisdiction—"Court which passed the decree."

The expression "the Court which passed the decree" in s. 232 C P C includes the Court which by reason of a transfer of jurisdiction has jurisdiction in respect of the subject-matter of the suit. S. 649 C P C should, if possible be so construed as to make it convenient to the parties to execute their decrees; the decree holders as well as the judgment debtors.

Udit Narain Chowdury v Mathura Pershad Mahati **12 C W N 859=35 Cal 974.**

(3) Application by transferee for rateable distribution-Court to which it lies.

2404.—C P C O 21, r 16 s 73=(1882 [illegible] and 295)

An application by a transferee of a decree for rateable distribution to the Court to which the decree was transferred for execution is bad, the same not being the Court " which passed it. "

Tamezhar Prasad v Thakur Prasad **[illegible] All 443=A W N (1903) 99.**

Notes.—Ref: 1 C L J 315.

(5) Application for execution by the transferee—*Contd*

(4) Discretionary power of Court

2405.—C P C O 21 r 16 =S 232—Execution by the assignee—Cross-decrees—Discretionary power of the court under section 232 C P Code.

The discretionary power the Courts have under s 232 as to allowing the assignees of a decree to execute it, must be exercised reasonably. The mere fact of the existence of a cross-claim by his judgment-debtor against the assignor is not a reason sufficient to refuse the issue of execution on the application of the assignee. **Krishna Mohini Dossee v Kedarnath Chuckerbutty** **15 Cal 446.**

Notes:—Ref: 9 Bom L R 728 ; 31 Bom 462.

(5) Application merely for recognizing transfer—Application for exceution.

2406—C P C O 21 r 16=(1882, S232).-Right of transferee decree-holder.—No application merely for recognizing transfer-Application for execution.

A transferee decree-holder can only apply to execute the decree under S 232, C P C. He can make no application merely for reconizing him as transferee and there is no provision of law requiring the court to recognize the validity of the transfer before the transferee applies for execution. **Ramachandra Aiyar v Subramaiya Chettiar.** **14 M L J 393.**

Notes.—Fol: 2 M L T 339 ; Ref : 31 Mad 234 =18 M L J 224=4 M L T 72. 17 M L J 300.

2407.—C P P O 21, r 16=S 232—Recognition of transfer by Court.

A Court charged with the execution of a decree has no other discretion with regard to noticing a transfer thereof than that which is given to it by s 208, which only applies to cases where the transferee can and does come forward to claim execution for himself, instead of the original decree-holder. **Bharut Chunder Roy v Nazir Ali Khan.** **10 W R 354.**

C P C (1908) O 21 r 16=(1882, S.232) —Contd.

(5) Application for execution by the transferee—*Contd.*

(6) Execution by assignee—Notice to transferor and to judgment-debtor.

2408.—C P C O 21, r 16=(1882 s 232) —Assignment of decree—Civil Procedure Code (Act XIV of 1882) Sec 232.

No execution of a decree can proceed at the instance of an assignee from the judgment-creditor unless notice has been served both upon the transferor and the judgment-debtor. The provision as to such notice in section 232 is imperative and makes such service a condition precedent to the execution. It is not enough if notice has been served upon the judgment—debtor alone. **Sreenath Das v Achutananda Mahanti.** **11 C L J 354=6 Ind Cas 262.**

2409.—C P C O 21 r 16=(1882 S 232).-Assignee of decree—Application to transmit decree for execution—Application for execution-Notice,

An application by an assignee of a decree to transmit the decree to another court for execution was treated an application under s 232 and notice issued to the assignor and the judgment-debtor. *Semble:* —That the practice in Calcutta is not to treat an application to transmit decree as one for execution and issue notice.
Nundo Lal v Chutterput Sing. 29 Cal 235.

(7) Separate suit.

2410.—C P C O 21 r 16=S. 232—Execution of mortgage decree by assignee.—

By a deed, 2nd July 1876., *Y* mortgaged properties Nos. 1 and [illegible] to *A*, and subsequently by separate deeds he again mortgaged the same properties respectively to B and *C*. *C* afterwards purchased *Y*'s equity of redemption in property No 2, and on the 19th November 1880 *A* obtained a mortgage decree against *Y*, which he sold to B who now sought to execute it. *C* was merely benamidar for B. *Held* that, on B consenting to allow property No. 2 to be first sold free of all incumbrances, it was necessary for B to proceed by regular suit. **Yakoob Ali Chowdhry v. Ram Doolal.** **13 C L R 272**

(8) Application to be placed on record as transferee of decree—Suit to be declared such transferee

2411.—C P C (1908) O 21 r 16, s 47 (=Civ Pro Code, 1882 ss. 232, 244)-Execution of decree.

C P C (1908) O 21 r 16=(1882, S. 232) —Contd.

(5) Application for execution by the transferee—*Contd.*

Where a person, alleging himself to be the transferee of a decree, had made an application, under s 232, to be entered on the record as such transferee and that application had been rejected, but it did not appear that the application was rejected under such circumstances as would debar the applicant from making a fresh application to the same effect; it was held that the applicant was not debarred from bringing a suit to have his right as transferee of the decree declared. **Imdad Husain v Lalta Prasad, A W N 1896, 201.**

2412.—C P C O 21 r 16=(1882 s.232)—Execution proceedings—Death of party, effect of—Fresh proceedings, intiation by representatives, if necessary—Assignee or legal representative, substitution of, if necessary—Conveyance authorising assignee to carry on all execution proceedings, effect of—Limitation Act s. 22, applicability to execution proceedings—Purchaser in execution of decree for rent, rights of—Bengal Tenancy Act, s. 148 (*h*)—Landlord's interests, vesting of, in the superior landlord, assignee, during the pendency of execution proceedings—Civil Procedure Code, O 22, r [illegible] and Act XIV of 1882, S. 332.

On the death of an execution-creditor or of a judgment-debtor the proceedings do not lapse, and the provisions relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor.

During the pendency of an appeal in execution proceedings on the death of the appellant, it is open to his legal representatives to apply for leave to prosecute the appeal.

There is no provision in the Code of Civil Procedure (Act XIV of 1882) which renders necessary the actual substitution of the name of an assignee or legal representatives for the validity of the proceedings in execution; all that sec 232 provides is that the assignee should apply for execution of the decree and that his name should be brought on the record.

Section 22 of the Limitation Act (XV of 1877) applies only to suits and does not govern execution proceedings.

S. 148 (*h*) does not speak of the assignor's interest but of the landlord's interest.

By the purchase at a sale in execution of a decree for rent due on a patni and by the subsequent service of notice under section 167 of the Bengal Tenancy Act, the purchaser supersedes the rights of both the putnidar and durputnidar and becomes entitled to realize rent directly from the tenants and their landlords and it cannot be maintained that the landlord's interest has not become vested in the purchaser.

When a landlord obtains a decree for rent and applies for execution of that decree and during the pendency of the execution proceedings the interest of the landlord, by operation of law, vests in the superior landlord who thereby becomes the direct landlord of tenants, and the interest of the landlord in the decree or rent is transferred to the superior landlord who is authorised to carry on the execution already initiated, in the name of either the assignor or the assignee, s. 148 (*h*) does not debar the superior landlord from executing the decree for rent in the same manner as the landlord decree-holder might have done.

The Court is bound to allow execution at the instance of the recorded decree-holder unless intimation has been given in the regular way prescribed by law for the admission of another person who obtains leave to carry on execution as an assignee.

The Court may, however, if satisfied that the decree has really been assigned, direct that the proceeds realized are not to be taken out by the recorded decree-holder but retained for the benefit of the assignee. **Monmotho Nath v Rakhal Chandra.** **10 C L J 396 =3 Ind Cas 324=14 C W N 752.**

(9) Sale of property, the subject of-Right to execute the decree

2413.—C P C O 21 r 16=(1882 S. 232).—

The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily carry with it the right to execute the decree.

The vendor obtained a decree for possession of certain property. He sold portions of the property to the respondents who applied for execution of the decree. *Held* that no application could legally be made to execute the decree under S. 232 of the C P C. **Hansrajpal v Mukhraji.** **4 A L J 759= A W N (1907) 280=30 All 28.**

(10) Decree Maintenance—Transferee of decree valid

2414.—C P C O 21 r 16=(1882 s 232.)—Decree for maintenance—Arrears accrued.—

Where under a decree for maintenance some arrears had accrued due and the same had been transferred to another.

Held, that the transfer though not of whole decree could be recognized under section 232 of the Civil Procedure Code. **Endoori v. Ayyalu** **6 M L T 294.**

6 ASSIGNMENT OF RENT DECREE.

2415.—C P C O 21 r 16=S 232—Bengal Tenancy Act s 148 (*h*)—Execution of a decree for arrears of rent by its assignee.

S. 148 of the Bengal Tenancy Act does not protect the assignee of a decree for the arrears of rent made before the Tenancy Act if he proceeds to execute it afterwards. But the Court executing a decree cannot refuse execution when the assignment had been recognised by the Court under s 232 before the Tenancy act came into force. **Koilash Chunder Roy v Jodo Nath Roy.** **14 Cal 380.**

Notes.—Ref: 1 C L J 500.

7 DECREE FOR THE PAYMENT OF MONEY AGAINST SEVERAL PERSONS TRANSFERRED TO ONE OF THEM

(1) Payment by debtor to assignor before notice—Assignee prevented from executing against debtor

2416.—C P C O 21, r 16 (=s. 208, Civ Pro

C P C (1908) O 21 r 16=(1882, S. 232) -*Contd.*

(7) Decree for the payment of money against several persons transferred to one of them—*Contd.*

Code 1859)—Joint decree-holders—Assignment by one to the other.—

Two creditors obtained a joint decree against a debtor, their interests in the decree being clearly defined. One of the creditors assigned his interest to the other, and under s. 208 of Civ. Pro. Code the Court ordered execution in favour of the assignee solely. The assignor petitioned the Court and got an order cancelling the assignment and recognising him as one of the decree-holders. The assignee who appealed against the order got an injunction restraining the debtor from paying the assignor. The appellate Court declared that the decree belonged to the assignee solely. Before the injunction was served on the debtor, he paid the assignor, the amount of the decree. *Held* that the assignee could not execute against the debtor. **Bertola v. Jeewun Ram 29 P R 1871.**

(2) Attachment of decree by one of the judgment-debtors—Execution of his own decree

2417.—C P C O 21 rr 16; 53=(1882 ss 232, 273—Decree against several persons—Attachment does not vest ownership—Attached decree capable of execution against co-judgment-debtors—Code of Civil Procedure (Act XIV of 1882) ss. 232, 273—Distinction between attachment and assignment of decree.

The rule that, when a decree is assigned, one of several judgment-debtors cannot take out execution, is founded on the ground that, by purchasing the decree, the assignee of it has discharged it and the decree no longer subsists, and his only right is to claim contribution from the other judgment-debtors. In the case of a decree which has been attached, the person, who has caused it to be attached, has not acquired the ownership of the decree and the person who attaches it is competent to do what the original decree-holder may have done Hence, where a person attaches a decree against himself and several others, in execution of a decree obtained by him against his decree-holder, *held* he is competent to take out execution of the attached decree against co-judgment-debtors. **Kalyan Singh v. Damber Singh 6 A L J 564=2 Ind Cas 626.**

C P C (1908) O 21 r 16=(1882, S 232) -*Contd.*

(7) Decree for the payment of money against several persons transferred to one of them—*Contd.*

(3) Assignment of the mortgage decree to one of the mortgagors—Validity.

2418.—C P C O 21 r 16=1882, S. 232—Execution of a decree—"A decree for money against several persons," meaning of.

The expression "a decree for money against several persons" in S 232 of the Civ Pro Code, 1882 signifies a personal decree for the payment of money against two or more defendants jointly.

Where a mortgage-decree calls upon all the judgment-debtors consisting of mortgagors and transferees of equity of redemption without distinction to pay up the decretal amount, and directs that, upon that failure to do so, the mortgaged properties will be sold, the decree is not a personal decree within the meaning of S 232 of the Civ Pro Code. **Laldhari Singh v Manager Court of Wards Bhapatpura Estate 14 C L J 639**

2419—C P C O 21 r 16=S. 232 of 1882—Transferee decree-holder—Assignment by one only of several decree-holders—Duty of Court executing decree.

There is no prohibition in law against one of several decree-holders assigning his interest under the decree to a stranger. But whether such an assignment ought to be recognised under S. 232 by a Court executing the decree must depend upon the circumstances of each case. Generally, the Court will recognise such an assignment, unless the judgment-debtor or the other decree-holders show that they will be prejudiced thereby. (17 Cal 341, followed.) **Muthu Narayana Reddi v. Balakrishna Reddi, 19 Mad 306=6 M L J 172.**

(4) Decree transferred to one of the persons against whom it is passed—Execution by the transferee.

2420—C P C O 21 r 16=(1882 S. 232)—Decree—Execution—Transfer of decree by operation of law—Decree transferred to one of the persons against whom it is passed as the legal representative of a deceased and against the property of the deceased — A decree for money against several persons.

(7) Decree for the payment of money against several persons transferred to one of them—*Contd.*

A decree was passed against P, as the legal representative of his brother A (deceased), and against S,as the legal representative of her father-in-law.L (deceased). The decree directed that the plaintiff (decree-holder) should recover Rs. 22,748 and costs from the property of each of the two deceased above mentioned. After making other provisions the decree provided " it will also be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit". The plaintiff died soon after obtaining the decree, which was transferred by operation of law to his heir P. Subsequently P applied to execute the decree against S.The Court rejected the application for execution upon the ground that it was a decree for money against P and S " jointly as well as severally ".

Held, (1) that there was nothing in the decree which saddled P and S with any personal liability to pay money,either jointly or severally. That question was expressly reserved by the decree for determination in the course of execution proceedings.

(2) that the amount of Rs. 22.748 and costs which was recoverable under the decree was made payable not by P and S personally but out of the property of the deceased A and L.

(3) that no doubt by reason of the direction in the decree that the question of the personal liability of P and S should be determined in execution proceedings, there might subsequently be, when that liability had been determined, a decree for money against them: but till then it was a mere contingency, which could not make the decree as it existed a decree for money against P and S.

(4) that, therefore, S. 232 of the Civil Procedure Code presented no bar to the decree of P being executed against the property of L in the hands of S.

The expression " a decree for money against several persons " in S. 232 of the Civil Procedure Code, 1882, means a personal decree for the payment of money by two or more defendants jointly. Clause (*b*) of S. 232 does not extend to a decree which may become a decree for money against several persons on determination by the Court. It applies only where in the decree there is a distinct order upon the defendants personally to pay the money. **Panachand v. Sundrabai, [illegible] Bom L R 409=31 Bom 308.**

(7) Decree for the payment of money against several persons transferred to one of them—*Contd.*

(5) Contribution suit.

2421—C P C O 21 r 16=(1882 S. 232) cl. (*b*)—Decree for money—Assignment in writing—Transfer to one of the judgment-debtors—Execution proceedings by the transferee.—

It was directed by a decree that N should pay Rs. 90 and Rs. 11-5-3 as costs, and A should pay Rs. 30 with Rs. 3-12-4 as costs. A afterwards took a transfer of the decree to him by an assignment in writing,and applied to execute it against N to the extent of the Rs. 90 and Rs. 11-5-3. The application was rejected on the ground that it came within cl. (*b*) of S. 232 of the Civil Procedure Code.

Held, that the decree for money so far as it related to the Rs. 90 and costs was not a decree against several persons but against one person,that is N and so far as that part of the decree was concerned, the transfer did not fall within cl. (*b*) of S. 232 of the Civil Procedure Code.

The purpose of cl. (*b*) of S. 232 of the Civil Procedure Code was not to deprive the transferee of a decree who might happen to be one of the judgment debtors of all right,but to impose upon him the duty of proceeding by what was considered a more appropriate, that is, a suit for contribution. **Anant Vinayak v. Nagappa Subraya, 10 Bom L R 89=32 Bom 195 =3 M L T 175.**

2422—C P C O 21 r 16=S. 232 of 1882—Co-debtor—Contribution.

If one debtor satisfies the judgment and takes an assignment of it, he cannot enforce it by execution or in any way against his co-debtors; his only remedy is to sue them for contribution. **Narayan v. Bhau, 1889 P J 262.**

(6) Joint-decree.

2423—C P C O 21 r 16=S. 232 of 1882—A money-decree transferred to one of the several

C P C (1908) O 21 r 16=(1882, S.232) -Contd.

(7) Decree for the payment of money against several persons transferred to one of them—Concld.

co-judgment-debtors – Joint decree.—

A had mortgaged certain property with B. Afterwards C purchased it in execution of a decree against A by a third person. [illegible] brought a suit upon his mortgage-bond against A and C, for the sale of the mortgaged property and for a personal decree against A. B then assigned his right to C who applied for execution under S. 232. A objected on the basis of proviso (*b*) of S. 232. *Held*, that proviso (*b*) S. 232 applies only to decrees for money personally due by two or more persons; and that B's decree against A and C not being a personal decree against C, C as assignee of B was entitled to take out execution. **Lalla Bhagun Pershad v. Holloway, 11 Cal 393.**

Notes:—Ref: [illegible] Bom L R 409; 31 Bom 308; 10 Bom L R 89=31 Bom 195.

(7) Ground for refusing execution to purchaser.

2424—C P C O 21 r 16=S. 232 of 1882—Joint decree—Purchase of decree by creditor of one of several judgment-debtors—Probability of decree being executed against another judgment-debtor.—

A decree for damages and costs having been obtained against P and C, A, to whom P was indebted and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a veiw to execute the decree against *C* if possible, purchased the decree. A applied under s. 232 of the Code of Civil Procedure, for leave to execute the decree. This application was rejected by Kernan J on the ground that the decree was certain to be executed against C and not against *P* under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to, the plaintiff in the suit. *Held* on appeal that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree. **Agra Bank v Cripps [illegible] Mad 455.**

C P C (1908) O 21 r 16=(1882, S. 232) -Contd.

8 RIGHT OF ASSIGNEE TO SUE FOR REFUND OF THE PRICE OR FOR DECLARATION OF HIS RIGHT

(1) Suit for declaration—Maintainability of.

2425.—C P C O 21 r 16=(1882 section 232)—Application by assignee rejected.

A suit by an assignee of a decree for a declaration that he is entitled to execute a decree cannot be maintained if the plaintiff has allowed an order dismissing an application under Section 232 to become final (1 A L J 61 followed. 20 All 539 Dist.) **Amanat-ul-lah Khan v Sardah Parshad. 3 A L J 428=(1906) A W N. 133=28 All 613.**

2426.—C P C O 21 r 16=(1882 s. 232.)

Transferee's suit for a declaration that the assignment of the decree is valid—How far his right to execute the decree can be decided in that suit.

The court passing a decree that an assignment of a decree is valid should simply decide as to factum and validity of assignment. It is within the province and discretion of the executing court to declare that the assignee is entitled to execute. (14 Mad 478 Ref.) **Bommanapati Veerappa v Chinnakunta Srinivasa Rao. 26 Mad 264.**

Notes:– Ref 14 M L J 401. Fol 28 Mad 60. F B.

(2) Suit for declaration of applicant's right to execute the decree.

2427.—C P C O 21 r 16=S.232—Application for execution by beneficial holder of decree-Application dismissed—Right to execute the decree.

Held that where an application under s. 232 of the Code of Civil Procedure by a person alleging himself to be beneficially entitled under a decree to execute such decree has been rejected, it is still competent to the applicant (no appeal lying from the order under s. 232 rejecting his application) to bring a separate suit for a declaration that he is the person entitled to execute the decree. (7 All 457 and 12 Cal 105 referred to) **Sheoraj Singh v Amin-ud-din Khan. 20 All 539.**

C P C (1908) O 21 r.16=(1882, S.232) —Contd.

(8) Right of assignee to sue for refund of the price or for declaration of his right —Contd.

Notes:—Doubt: 28 All 613=3 A L J 418=(1906) W N 183.

(3) Execution disallowed—Suit by transferee for decretal amount.

2428.—C P C O 21 r 16=S 232—Application of transferee of decree for execution disallowed—Declaratory decree.

The transferee of a decree for costs, associating with him the transferor, made an application under s. 232 of the Civil Procedure Code to be allowed to execute the decree. The application was opposed by the judgment-debtor and was rejected and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him. *Held* that the plaintiff as the holder of the decree by assignment could only recover the amount under it by executing the decree, and not by a separate suit but that he was entitled to have a decree declaring that the assignment to him of the decree holder's rights under the decree was valid, and gave him a right to execute it and that the Court's order under s 232 which disallowed the execution, was an improper one, a suit for this relief being maintainable; for, there being no appeal from orders under s. 232, there would otherwise be no remedy; and that, looking at the plaint and the issues on which the parties were divided, and the fact that the Court which refused the plaintiff's application for execution referred him to a regular suit, this relief might properly be given in the present suit. *Per* Mahmood; *J*; that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree the questions which were disposed of by the Court execution of the decree as between the plaintiff and the judgment-debtor, could not be regarded as questions with s. 244 of the Civil Procedure Code, **Ram Bakhsh v Panna Lal. 7 All 457.**

Notes:—Fol 20 All 539. Con: 16 All 483.

(4) Dispossessed of property—Disputing right of decree-holder to be put into possession.

2429.—C P C O 21 r 16=(1882 s. 232.)—Suit by.

C P C (1908) O 21 r.16=(1882, S.232) —Contd.

(8) Right of assignee to sue for refund of the price or for declaration of his right —Contd.

Held, that a tenant or mortgagee of a *muafidar* could not claim to retain the land after the grant had been declared to be resumable in proceedings fairly conducted between the grantor and the grantee. *Held*, further, that the plaintiff not being a party to the decree for possession passed against defendant No. 1 should not have been dispossessed in execution but having been dispossessed he had to prove his right to a decree for possession; and the defendants No 2 to 5 having proved a superior right to the possession of the property his suit was properly dismissed. **Gaya Parshad v N Tasadduk Husain 6 O C 110.**

(5) Suit by transferee to establish his right

2430—C P C O 21 r 16=S.232-Pre-emption suit -Execution of decree-Transfer of right to execute decree for present possession, right of ownership being reserved—Refusal of execution Court to allow transferee to execute decree—Procedure—Civil Procedure Code, 1882, Sections 232, 244.

In September 1880 M. and others sold the house in dispute to J. S. and S. D., who in July 1883 obtained possession thereof from certain mortgagees. In 1884 one A. D. sued for pre-emption in respect of the sale of 1880, and on the 11th December 1884 obtained a decree for pre-emption payment of Rs. 170, and was awarded Rs. 62-2-0 for costs. A. D. deposited the Rs. 170 into Court on the 3rd January 1887, but on the 6th July 1887 one J. in execution of a decree against A. D., attached and realized Rs. 103-9-0 out of the said Rs. 170. On the 26th June 1888 the appeal, which the vendors had preferred to the Divisional Judge, was accepted, whereupon A. D. appealed to the Chief Court, which, after a remand for further inquiry, allowed the appeal and decreed the claim with costs throughout, in favour of A. D., by an order dated 27th April 1891, and to the following effect: "It is ordered that the decree of the Divisional Judge, Sialkot, dated 25th April 1889, be set aside, and a decree be passed to the effect that if plaintiff deposit Rs. 170, or that portion of the money which has not already been deposited, within two months from this date he can take possession by pre-emption of house No. 81, situate in Mauza Ferozewala. It is fur-

(8) Right of assignee to sue for refund of the price or for declaration of his right —Contd.

ther ordered that defendants, vendors, should pay the costs incurred by plaintiff in all the Courts." It was admitted that A. D. paid nothing into Court subsequently to the said decree, but the judgment-debtors owed him Rs. 134-3-0 for his said costs, and the balance of Rs. 35-14-0 was more than covered by the sum of Rs. 83-6-6 which the judgment-debtors had recovered from A. D. on account of costs and which they had to refund. On the 28th August 1892, A D. while reserving to himself the right to redeem the house from mortgage, sold his right to execute the said decree for present possession and costs awarded to one R. R , who thereafter applied for execution of the decree. This application having been refused by the Divisional Judge, on appeal, whose order was confirmed by the Chief Court. R. R , as transferee of the decree, subsequently instituted the present suit for possession of the said house and for a certain sum of money alleged to be due by way of costs. The first Court granted R. R., a decree as prayed for, but the Divisional Judge, on appeal, varied the decree by one declaring that assignment of the decree of the Chief Court by A. D. in favour of R. R. was valid and gave R. R. a right to execute the said decree, notwithstanding the order of the execution Court disallowing the said assignment. J. S. and S. D. appealed to the Chief Court, and it was contended on their behalf that (1) the Divisional Judge should not have given plaintiffs the declaration contained in the decree (a) because it was not asked for, and (b) because the relief claimed by plaintiff had been already refused him by the execution Court under Section 244, which order was a decree and could not be called in question in a subsequent suit ; (2) even if the suit did lie, a decree should not have been passed that plaintiff was entitled to execute the decree of the Chief Court of 27th April 1891, the said decree having lapsed owing to the failure of plaintiff to pay Rs 170 into Court within the allotted period; and (3) the right to execute the decree for pre-emption could not be assigned

Held, as to the first contention, that the Divisional Judge, while refusing to give a decree for possession of the house and recovery of the costs incurred by A. D, in the pre-emption suit was entitled to declare that plaintiff had a right to execute the pre-emption decree and further, that inasmuch as R R. was admittedly the assignee of A. D. the refusal of the execution Court, under Section 232 of the Code, to allow R. R. to execute the decree, was final, and gave R. R. a cause of action against the judgment-debtors which he could enforce by regular suit. (75 P R 1890, F B cited and followed.)

Held, as to the second contention, that, upon the facts as proved, A D. had duly deposited the Rs. 170 before the 27th April 1889, and that upon that date there remained no portion of the said sum to be deposited.

Held, as to the third contention, that A. D. was entitled to sell his right to execute the decree for costs and present possession of the house, retaining his rights as owner and merely giving the vendor a right to present possession.

Semble: Even if A. D. had transferred the proprietary right in the property to R. R. the latter would have been entitled to execute the decree, such transfer operating a fresh sale of the property and conferring a fresh cause of action upon pre-emptors, which, however, could only be asserted in a regular suit and not in proceedings for execution of the decree so transferred. **Jowala Sahai v Ram Rakha.** **78 P R 1896.**

(6) Right of assignee.

2431.—C P C O 21 r 16=S. 232 of 1882.

Where *S* obtained a decree for possession against *D P* the person in possession, and subsequently in a suit brought by *J P* claiming the property against S, a decree was passed in the terms of a compromise, whereby S consented that *J P* should execute his decree--*Held* that *J P* was entitled, under s. 208 Civil Procedure Code, to recover possession in execution of *S*'s decree from *D P*, although *D P* had not been made a party to the second suit. **Doorga Pershad Singh v Lalla Juggunnath Pershad.**

1 N W 34; Ed 1873, 81.

(8) Right of assignee to sue for refund of the price or for declaration of his right —*Contd.*

(7) Decree for plaintiff—Right of assignee to execute the decree.

2432.—C P C O 21 r 16, O 22 r 10=(1882 ss. 232, 372)—Assignment of decree by plaintiff pending suit.

Where the plaintiff in a pending suit assigned the decree to be passed in his favour, to a third person but the suit was allowed to proceed in the name of the plaintiff alone, and the final decree was passed in his favour.

Held that the plaintiff's assignee was not entitled to execute the decree as the transferee decree-holder under [illegible] 232 of the Code of Civil Procedure as there was no decree in existence at the time the assignment was made. (16 Mad 429 Ref to; 21 Mad 388 Dist.) **Basroor Vittal Bhandari v Ramachandra Kamthi.**

2 M L T 197=17 M L J 391.

(8) Omission to make formal application to execute it.

2433—C P C O 21 r 16=S. 232 of 1882—Assignee's right of execution—Omission to make formal application.—

The decree holder applied for the execution of the decree and pending the execution proceedings assigned the decree. The Court executing the decree can recognise the transferee as a person to go on with the execution even if he has omitted to make a formal application for execution, such omission being merely an error of procedure not affecting the merits of the case.

Dwar Baksh Sirkar v. Fatik Jah.
26 Cal 250=3 C W N 222.

Notes:—Fol: 27 Cal 670: 25 Mad 529; 28 Mad 87=14 M L J 474. Ref: 6 A L J 71 F B; 31 All 83 F B.

(9) Right of vendee when execution is refused—Right of suit.

2434.—C P C O 21 r 16=S. 232—Sale of decree-holder's interest under a decree.

(8) Right of assignee to sue for refund of the price or for declaration of his right —*Contd.*

The assignee for value of a decree obtained by two persons, of whom one was a minor, applied for execution of the decree, but his application was refused under Civil Procedure Code s. 232. He now sued to recover from his assignor the sum paid by him for the assignment. *Held* that the plaintiff was entitled to recover. **Ramasami v Basavappa.** **16 Mad 325.**

(10) Notice to judgment-debtor-Attachment is issued before hearing judgment-debtor's objections.

2435—C P C O 21 r 16 and ss. 99, 151—Decree—Assignment of decree—Execution of decree—Illegality—Irregularity—Practice.

The assignee of a decree applied to the Court, under O XXI. [illegible] 16 of the Code of 1908, for notices to the transferor and the judgment-debtor, on the 18th June, 1910. He applied at the same time for attachment by seizure of the goods of the judgment-debtor in his shop. On the same day notices were issued by the Court and also a warrant of attachment. Before any objection had been heard on the part of the judgment-debtor, the property was attached in his shop by seizure on the 20th June 1910. The objections were heard on the 26th June, and on the 6th August, 1910 the Court *held* that the assignee was entitled to execution of the decree against the judgment-debtor. The lower Court held that the procedure adopted was a mere irregularity and the proceedings in attachment should not be set aside. *Held*, that the procedure adopted was unlawful and not merely irregular, inasmuch as the objections of the judgment-debtor had not been heard before the attachment, which was a step in the execution proceedings, had been ordered. **Kassum Goolam v Dayabhai.**

13 Bom L [illegible] 973.

(11) Right of third person, claiming under independent title, to property sold in execution.

2436—C P C O 21, r 16=Ss. 232, 335—Assignment of decree, to question validity of assignment.

A person who sets up [illegible] totally independent title in himself to property which has been sold in execution of a decree against another as that other's property, cannot be allowed to object

(8) Right of assignee to [illegible] for refund of the price or for declaration of his right —Contd.

that, although the order for execution was made by [illegible] Court of competent jurisdiction in the exercise of its discretionary powers, there was no legal evidence to support it, and, therefore, that the sale under it was null and void.

A having obtained a decree on [illegible] mortgage of a house, sold the decree to the plaintiff, who obtained execution and purchased the house at the execution sale:

Held, that the defendant who had obstructed the plaintiff in obtaining possession claiming under a mortgage from a third person, who, he alleged was the true owner, could not dispute the validity of the assignment to the plaintiff on the ground that A, who was merely an agent for another, had no authority, under his power of attorney to transfer the decree. **Shaligram v Hanmantram. 1882 P J 149.**

(12) Suit by assignee to establish lien under the deed on property subsequently sold.

2437—C P C O 21, r 16=S. 232—Assignment of money-decree obtained on specially registered mortgage-decree—Suit by assignee to establish lien under the deed on property subsequently sold—Validity of assignment—Registration Act (XX of 1866) Section 52.

Plaintiff sued, as the assignee of the rights and interest of the holder of a money decree-obtained upon [illegible] specially registered mortgage-deed against the defendant, to establish a lien under the said deed with respect to certain of the mortgaged properties sold to the defendant subsequently to the date of the money-decree.

Held, that the decree obtained under the mortgaged deed specially registered under the provisions of Section 53 of the Registration Act of 1866, could not be held to be non-assignable, and therefore incapable of being executed by the plaintiff, simply because the bond itself so registered could not be sued upon by the assignee summarily, [illegible] Section 232 of the Code of Civil Procedure allows a Court executing a decree to permit such decree to be executed by the assignee and there is no provision disabling an

(8) Right of assignee to sue for refund of the price or for declaration of his right - Concld.

assignee of a decree obtained under a specially registered bond from obtaining such permission. **Mussammat Makhni v Adjudhia Pershad P R 142 of 1882.**

9 APPEALS FROM ORDERS UNDER THIS SECTION.

(1) Recognized as legal representative—Appeal.

2438—C P C O 21, r 16 ; S. 47=(1882 Ss. 232 244)—Applicant to be recognized [illegible] legal representative—Separate suit:

The proper remedy for a person whose application for being brought on the record representative of the deceased judgment-creditor is dismissed without inquiry, is an appeal from the order, and not a separate suit for declaration. (25 Mad 548 Ref) **Kunhammad v Amad. 16 M L J 27.**

2439—C P C O 21, 16; S. 47=(1882 S. 332, 344)—Appeal—Order refusing to recognise transferee of decree.

An order passed under s. 332 of the Civil Procedure Code refusing to recognise the transferee of a decree may, for purposes of appeal, be regarded as an order under S. 244, and is hence appealable. (25 Mad 385 Not Fol.) **Subbuthayammal v Chidambaram Asari. 25 Mad 383.**

Notes.—Ref: 6 M L T 273.

(2) Assignee of a decree and the judgment-debtor—Question is decided—Decision is appealable.

2440—C P C O 21, [illegible] 16; S.47=(1882 Ss.232, 244).

When as between the assignee of a decree and the judgment-debtor any question is decided which falls within the scope of S. 244 C P C the decision [illegible] appealable. (3 Cal 371 ; 11 Bom 506 ; 26 Cal 250 ; 27 Cal 670 : 16 All 483 ref. 11 Cal 393 and 7 All 457 dist.) **Chhojmal Sepani v Govind Prasad Mahajan. 15 C P L R 69,**

C P C (1908) O 21 r 16=(1882 S. 232) -*Contd.*

(9) Appeals from orders under this section—*Contd.*

(3) An appeal lay from the order under S. 244

2441-C P C O 21 r 16-S. 47=(1882—Ss, 232. 244)—Appeal:

When an application by the executor to the estate of a Hindu lady to execute a decree which fell to her share upon a partition of her husband's estate between herself and her sons was refused on the objection of the sons and the judgment-debtors that the lady had only a life interest in the decree and that it passed on her death to her sons:—*Held*, that an appeal lay from the order under S. 244, C P C the question arising being a question between the legal representative of the lady and the judgment-debtors.

Hridoy Kant Bhattacharjee v Behari Lal Mukerjee. 11 C W N 239.

(4) Assignee—Representative—Decree-holder.

2442—C P C O 21 r 16 s.47=(1882 Act XIV of 1882—ss. 232, 244)

Where an application made by the assignee of a decree under s. 232 of the Code of Civil Procedure, 1882, is objected by a Court, the assignee's remedy lies in an appeal from the order of rejection under s. 244 of the Code of Civil Procedure, and not in a suit for declaration that he is the assignee of the decree, and as such competent to execute the same. The transferee of a decree is a representative of the decree-holder within the meaning of that s. *qua* the decree. (16 all 483 Ref:) **Budhan Singh v Salig Ram. 1 A L J 61.**

Notes;—Fol 28 All 613=A W N 1906, 133=3 A L J 428.

(5) Assignee of a decree-holder.

2443—C P C O 21 r 16=S 232 of 1882.

When an order of the first Court, which purports to have been passed under section 232 but is in reality one passed under section 244 applies equally to the original decree-holder and the transferee, there is room for second appeal from it. An order of the first court refusing to execute a decree on the ground that it has been satisfied by a payment to the original decree-holder which had not been certified to the court cannot be upheld as that ground cannot sustain a refusal to execute the decree at the instance of the decree-holder.

Deoji v Ranchordas. 4 C P L R 132.

2444--C P C O 21 r 16=S. 232—Appeal—Assignee of decree.

Under s. 11. Act XIII of 1861, [illegible] appeal lay from an order passed under s. 208, Act VIII of 1859, substituting the assignee of a decree in place of the original decree-holder. **Megh Narayan Singh v Radha Prasad Singh 4 B L R A C 200, 13 W R 224**

See contra. Framji Rustamji v Ratansha Pestanji [illegible] Bom H C R 49.

(6) Order for substitution of name of assignee in place of that of decree-holder—Appeal.

2445—C P C O 21 r 16, s. 47=(Ss. 232, 244, Civ Pro Code 1882) Execution of decree—

On an application for the substitution of the name of the assignee in the place of that of the original decree-holder, the following order was made:

"That the objections taken by the judgment-debtor be disallowed with costs and the name of the purchaser of the decree be substituted in place of the original decree-holder, and that the case be struck off the miscellaneous file and a report be called for from the execution department." *Held* that the above order was an order coming within the provisions of s. 244 of the Civ. Pro Code and not merely an order preliminary to something to be done in the execution department, and being such, was appealable. **Pesche v Aulad Fatima A W N 1891, 87.**

10 LIMITATION & STEP IN AID OF EXECUTION.

(1) Limitation Act Art 179—Step in aid of execution.

2446—C P C O 21 r 16, O 22 r 4=(1882 Ss. 232 and 368)—Application by transferee of

(10) Limitation and step in aid of execution—*Contd.*

decree to bring in defendant's representative on record—

There is nothing in S. 232 of the Code to prohibit the transferee of a decree from applying for and obtaining an order, under s. 368 of the Code, to bring in the representatives of defendant on record. Such an application is a step in aid of execution. **Mahalinga Moopanar v Kuppanchariar 17 M L J 485=3 M L T 21 =30 Mad 541.**

(2) Step in execution—Application by transferee decree-holder for recognition by the Court—Limitation.

2447—C P C O 21 r 16=(1882) Civil Procedure Code S. 232—Application by transferee decree-holder for recognition by the Court—Limitation Act Art 179 (4). An assignee of a decree applied to be recognised as assignee and an order was passed accordingly.

Held, that the application for recognition by a transferee-decree-holder is an application to take a step in aid of execution in accordance with law; and therefore the execution petition presented more than three years after the date of decree but less than three years from the application for recognition, is not barred by Art. 179 (4) of the Limitation Act. (14 A L J 393 Ref. 29 All 301 Fol.) **Annamalai Mudaliar v Rama Ier 4 M L T 72=18 M L J 24=31 Mad 234.**

(3) Question of consideration to assignment foreign—Limitation Act.

2448—C P C O 21 r 16=(1882—S. 232)—Application for being recognized as transferee—

Semble-The questions as to whether there was consideration for the assignment of a decree or whether the consideration is fraudulent and colourable is irrelevant for the purposes of disposing of an application by her assignee to have his name substituted. But where the application has been disposed of on a consideration of the question, it will not help to revive limitation under Art. 179 of the Limitation Act. **Inti Khrab Husain v Rafi-un-nissa 1907 A W N 39.**

(10) Limitation and step in aid of execution—*Concld.*

C P C (1908) O 21 r 16—Proceedings subsequent to preliminary decrees for redemption and sale. **See 8 Ind Cas 986.**

11 MISCELLANEOUS.

2449—C P C O 21 r 16: S.60=(1882 ss. 232, 266, 273, 284)—Transfer of Property Act (IV of 1882), s. 89—Civil rules of Practice, Rule 184—Mortgage-decree, sale of, in execution, whether valid, and passes title to the purchaser—mortgage-decree how far a money-decree—Transfer of Property Act, scope of—Civ. Pro. Code, s. 273. scope of—Jurisdiction of Courts, in the absence of specific provisions.

On the application of C, the Lower Court passed an order allowing execution of 3 mortgage decrees against the appellants which were obtained by N and purchased by C. C sought to execute them at a Court auction-sale held in pursuance of a decree in another suit instituted by C against N to enforce a hypothecation bond by which N had pledged as security the mortgage decrees which he held.

Held that the petition of C for execution of the mortgage decree obtained by N had been rightly allowed by the Lower Court.

Per Abdur Rahim, J.—Whether a mortgage decree which directs the payment of a certain sum of money as well as the sale of the mortgaged property is to be regarded as a money-decree depends on the connection in which the question arises. For the purpose of section 273, however, a decree for money which is sought to be attached in execution includes a decree upon a mortgage and the effect of s. 273 is to prohibit the sale of a decree for money which had been attached in execution. But it would be extending the application of the section, if it is to be held that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. That section which merely enacts a rule of procedure cannot be recorded a scope which would indirectly affect an important question relating to the right of the decree-holder to deal with his rights under the decree.

Section 232 recognises the validity of a pledge of a decree as security no less than the validity of its sale and there is nothing in reason why, if

C P C (1908) O 21 r 16=(1882 S. 232) -Concl t.

(11) Miscellaneous—*Concld.*

a decree-holder can sell his decree, he cannot make it security for his debts. It follows therefore that if there is nothing in the law to prevent the decree-holder from pledging his decree as a collateral security, it must be within the competence of the Court which is asked to enforce such a contract to order the sale of the property pledged. (25 Mad 244 expld. 28 Mad. 473; 28 Bom 630, 26 Cal. 839; 16 All. 259. Ref; 2 All, 290; 6 Mad.418; 20 Cal. 111; 16 Bom 582, Ref. 9 All. 46; 5 All. 142 (157) (P C); 10 Bom 444. Ref. 6 Mad 418 Dist.) **Subbaraya Rowthu Minda Nainar v Kuppusawmy Aiyangar 5 M L T 278=1 Ind Cas 535.**

—O 21 r 16—Change in the language of section—Effect. **See 14 C W N 922.**

—O 21 r 16—Transfer of decree—Due diligence. **See** C P C (1908) s 48. Case No (913) **2 All 384.**

—O 21 r 16—See C P C (1908) S 37. Case No. (121). **35 Cal 974.**

—O 21 r 16—Power to adjourn and direct persons interested to be made respondents. **See** C P C O 41 r 20. Case No. 3103. **8 C L J 159.**

—O 21 r 16—Applicalibity and scope of **See** C P C O 21 r 2. Case No. 2198. **12 C L J 312.**

—O 21 r 16—Question—between the legal representative and judgment-debtors—appeal. **See** C P C (1908) S 47. Case No. (505). **11 C W N 239.**

—C P C (1908) O 21 r 16. See C P C (1908) S 42 Case No. 130. **13 C W N 533.**

—O 21 r 16—Application of this rule to security bond constituting mortgages. **See** C P C O 34 r 14 Case No 2907. **17 M L J 503.**

—O 21 r 16—**See** C P C (1908) S 2 cl 2 Cases Nos. (40—41) **3 O C 32.**

—O 21 r 16—Execution of decree—Power of Court executing transferred decree to implead representative of deceased judgment—debtor——Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court. **See** C P C 1908 S 47. Case No. 203. **70 P R 1897.**

C P C (1908) O 21 r 17=1882 S 245).

Notes—This rule corresponds to section 245, C P Code, 1882 with some additions, alterations and omissions.

Sub-rule (1) corresponds to para 1 of s. 245 C P Code, 1882, with some alterations and omissions. The words *"to be remedied"* have been substituted for the words "to be amended" as the word *"amended"* did not cover the supplying of any defect; and the last sentence of the old section, *viz:—"If the application be not amended, it shall be rejected,"* has been omitted. The other changes are mere verbal.

Sub-rule (2).—This sub rule is new, and it has been framed to remove some doubts which hitherto existed, as to whether a defective application for execution can save limitation and to set at rest the several conflicting rulings noted below. Sub-rule (2) has made it clear that even if an application for execution was defective when it was filed and subsequently amended, the amended application shall be deemed to be an application in accordance with law and to have been presented on the date when it was first filed.

Sub-rule (3)—Corresponds to para. 2 of sec 245 of the old Code with some verbal alterations.

Sub-rule (4)—Corresponds to para. 3 of the old section with the addition of the words, *"subject to the provisions hereinafter contained."*

The proviso to this rule corresponds to the proviso of the old section with some verbal changes. For the meaning of the words " decree for payment, of money, " see rule 30 of this order.

See Cases under,

(1) Execution of decree—Application for Execution and Powers of Court, etc.

(2) Limitation Act, 1877, Art. 179—Nature of Application-Irregular and defective applications.

2450-C P C O. 21 r. 17=S.245-Application in terms of decree—Decree needing correction.

Under s. 15, Act XXIII of 1861, if an application for execution corresponds with the terms of a decree, it should be admitted. If the decree needs correction, the Court executing cannot correct it; but it is for the defendant to apply to the Court which made the decree. **Bisheshur Roy Chowdhry v Bisheshur Bose. 8 W R., 277.**

C P C (1908) O 21 r 17=(1882,S.245)

-Conta.

2451—C P C O.21 r. 17=1882 S.245—Investigation of title—Execution of decree—Act VIII of 1859, s. 214.

Neither s. 214, Act VIII of 1859, nor s.15, Act XXIII of 1861, contemplated any enquiry before the Court, whether the property belongs to the judgment-debtor or not. **Subjan Bibi v Saristulla. 3 B L R., A C., 413: 12 W R., 329.**

Notes.—See 12 W R 329.

2452—C P C O. XXI r. 17=1882 s. 245—Filing decree—Civil Procedure Code, 1859, s. 215.

S. 15, Act XXIII of 1861 (Act VIII of 1859, [illegible] 215), did not make it essential that the decree itself should be filed, but only required certain particulars specified in s. 315, Act VIII of 1859, on which the Judge is empowered to pass orders for execution. **Sufur Ali v Mohesh Chunder Kaug. 4 W R., Mis., 16.**

2453—C P C O. 21 r. 17 O. 21, rr. 10, 21, s.48; =(1882—Ss. 245, 230)—Unverified petition for execution—Return for amendment—No saving of the period of limitation of twelve years.

An unverified petition may be return for amendment under S. 245, C P C. but the fact that it is so returned and represented after being amended does not prevent the operation of the limitation of twelve years under S. 230. C. P. C. Where, therefore, on the last day of the twelve years' period an unverified application was made for execution by one who did not produce his power of attorney and the petition was returned for amendment under S. 245 and was amended within the time allowed by court, and when represented was more than twelve years after the date of decree. *Held*, that the execution application was barred by limitation. **Thathachariar v Venkatesa Tawker.**

12 M L J 435=26 Mad 101.

2454—C P C—O. 21 r. 17—S. 47=(1888 Ss.245 244)-Objection by judgment debtor to the executability of the decree.

S. 244 (c) is not intended to apply to a case where the judgment-debtor against whom [illegible] decree for sale has been obtained as the representative of the mortgagor tries to set aside the effect

C P C (1908) O 21 r 17=(1882,S. 245)

-Contd.

of a decree. It refers to proceedings in execution based on the decree as if the decree was perfectly good and valid. (27 Cal. 243 dist.; 19 All. 480, 21 All. 277, Ib 356 ref to.). **Khetrapal Singh Roy v Shyama Prosad Barman. 32 Cal 265.**

Notes:—Fol: 16 M L J 545. Ref: 30 Mad 26; 8 C L J 20.

2455—C P C—O. 21 r. 17=s. 245—Irregularity in application for execution—Procedure.

S. 15, Act XXIII of 1861, did not authorize a Judge to reject an application for the execution of a decree [illegible] the ground of an irregularity in form. Where the application is irregular, the Judge should either return it immediately to the applicant for correction, or with his consent cause the necessary correction to be made. **Chowdhry Purladh Mahapattar v Chowdhry Jonardon Mahapattar. 6 W R., Mis., 15.**

2456—C P C—O..21, r. 17=S. 245 of 1882.

In this case while the defendant's appeal was pending in the High Court, the plaintiff, on the 21st June, 1880, took out execution of the Judge's decree in their favor for possession, and having obtained it, the proceedings were struck off on the 17th December, 1880. Subsequently [illegible] fresh application was made and on the 19th May the judgment-debtors were arrested but were released [illegible] payment of a certain sum. On the 31st May, 1881, the defendants' appeal in the High Court was dismissed in the following terms:—"The lower Court's decree is affirmed and the appeal is dismissed." On the 27th July, 1881, the plaintiffs again applied to the Subordinate Judge for execution of the Judge's decree (and not that of the High Court) and similar proceedings were taken from time to time, up to July, 1884, when for the first time the defendants objected that all the applications for execution subsequent to the decree of the High Court were informal and the High Court's decree was accordingly time-barred. The Subordinate Judge accepted this contention in its entirety. The lower appellate Court rejected the application [illegible] informal but refused to give any opinion as to whether an application for execution of the High Court's decree would be time-barred or not. *Held* that [illegible] the error was a mere technical one the Judge should have allowed the

C P C (1908) O 21 r 17=(1882, S.245)
-Concld.

application to be amended under s. 245 of the Code of Civil Procedure and should then have disposed of it according to law. **Ganga Dial v Kharsaran.** **5 W N 304.**

—O 21 r. 17—Execution of decree—Attachment—Appeal. See C. P C (1908) S. 47. Case No (569). **A W N (1888) 155.**

—O. 21 r. 17—See C P C O 6 r. 17. Case No 1633. **17 Mad 67.**

—O 21 r. 17—Written application for execution See C P C O 21 r. 11. Case No 2348. **21 P R 1899.**

C P C O 21 r 18=S. 246 of 1882

Notes.—This rule corresponds to section 246 of the C P Code of 1882. with some modifications. No redical change seems to have been made in the meaning; but the old section has been re-arranged by transposition of some words and sentences, and some of its words and phrases have been replaced by more appropriate words and expressions to make the present rule more clear and intelligible. The words *"in separate suits"* have been added after the word "cross-decrees," in order to show that this rule is applicable to cross-decrees obtained in separate suits and not cross-claims under one decree, for which provision is made in rule 19. The addition seems to have been made adopting the principle laid down in 5 All 372.

Sub-rule (4) is new: and it has been framed in accordance with the principles laid down in 14 All 339 and 9 Cal 479: 13 C L R 93. The illustration (d) which has been newly added, clearly explains the meaning of sub-rule (4).

"This addendum has been introduced in accordance with the views of the Calcutta and Allahabad High Courts as expressed in the cases of (9 Cal 479) and (14 All 339."—*See the Report of the Special Committee.*

C P C O 21 r 18=S. 246 of 1882.
See Set-off-cross-decrees **(1905) 29 Mad 313**

O 21 r 18=s. 246=S 283 (1882)
See Right of suit **P R 84 of 1870**

C P C (1908) O 21 r 18=(1882, S.246)
-Contd.

Civ. Pro. Code—O. 21. r. 18—(Act VIII of 1159 S. 246—Claim proceedings—Judgment-debtor. not necessary party—No notice served—Not bound by order. **9 M L T 423.**

2457.—C P C O 21 r 18=(1882 S. 246)—Execution of decree—Cross-decrees—Set off—Decree against which set off is claimed not before the court for execution.

S 242 of the Code of Civil Procedure clearly contemplates that where a decree is sought to be set off against another, the decree against which the set-off is asked for must be before the Court for execution. (L R 13 I A 106 Ref to.)

Chajmal Dass v Lal Dharam Singh.
1902 A W N 126=24 All 481.

2458.—C PC O 21 r 18=(1882 S.246)-Requirement where claim is to set off decrees.

S. 246 of the Civil Procedure Code clearly requires that both the decrees in relation to which set off is claimed should be before the the Court for execution. (24 All 481 Ref: 26 Mad 428 Dist.) **Ponnusami Nadar v Doraisamy Aiyer.** **5 M L T 144=32 Mad 336=1 Ind Cas 247.**

2459.—C P C O 21 r 18=C P C s 246—Transferee of decree.

The assignee of a decree, which subsequent to the assignment is appealed against and confirmed by the appellate court without his (the assignee's) name being brought on the record, is an assignee within the meaning of S. 246, Civil Procedure Code, and a satisfaction entered on the decree under the provisions of that section is binding on him though made subsequent to the assignment to him and before his name is brought on the record. **Ramakrishna Aiyar v Narayana Aiyar.** **7 M L J 227.**

2460.—C P C O 21 r 18; S 49=(1882 ss 246 233)—Cross-decrees—Notice of assigument.

Where there are cross-decrees in suit between the same parties. the decree for a smaller amount becomes incapable of execution under S 246 C P C and the decree for the larger amount less the decree for the smaller amount is alone capable of execution. The decree for the smaller amount

C P C (1908) O 21 r 18=(1882,S.246) *–Concld.*

was subject to the equities under S 246. S. 246 is applicable to the case where the cross-decrees are passed by the very court whose duty it is to execute them and neither has been transferred for execution to another court. Where a decree is assigned the assignment takes effect against the judgment-debtor only on notice to the latter, and the assignee takes it subject to the equities attaching to such decree under s. 246. *Vide* s 233 C P C. Where, therefore, there was a decree against S, and the decree-holder assigned it to the appellant, but before the assignment was perfected by notice, S obtained a decree for a larger sum against appellant's assignor. *Held*, (1) that appellant took the assignment subject to the equity attaching to the decree under s 246, C P C (2) that the appellant could not execute the decree assigned to him againsts. **Sinnu Pandaram v Santhoji Row. 12 M L J 398= 26 Mad 428.**

2461.— C P C O 21 r 18=C P C ;s 246—Cross-decree—Set-off—Decree-holder benamidar —Question in execution.

Held, that a judgment-debtor is entitled to set off a decree obtained by him against the decree-holder although the latter is alleged to be a mere *benamidar* in respect of the decree obtained by him and that the question whether he is a *benamidar* or one beneficially entitled to the decree cannot be determined in execution.

Veerabhadra Razu v Jagannadha Razu 3 M L J 220.

C P C (1908) O 21 r 18—Attaching creditor **See** C P C (1908) S 47. Case No 344. **29 Mad 318.**

C P C O 21 r 19=S. 247 of 1882.

Execution in case of [illegible] claims under same decree.

Notes.—This section corresponds to sec 247, C P Code, 1882, with some alterations; but no radical change has been made in the meaning. The old section has been re-arranged and some of its words and phrases have been replaced by more clear and appropriate words and expressions. This rule is applicable to cross-claims under one decree only and not cross-decrees in separate suits.

C P C (1908) O 21 r 19=(1882,S 247) *-Concld.*

C P C O 21 r 19=S 247—
See Set-off-Cross-decrees.

2461.A—C P C (1908) O 21 r 19 (=Civ Pro Code, 1882, s 247)—Foreclosure decree—Provision for payment of money to defendant-Right of defendant to execute his decree,—

Where a foreclosure decree provided for payment of money by plaintiff to defendant, s 247 of the Code did not prevent the defendant, from executing the decree in his favour.(16All 395 Dist.) **Chhogmal v Govind Prasad Gouri Shankar 16 C P L R 73.**

2462.—C P C O 21 r 19=(1882 S 247)-Cross Claims under the same decree—Execution.—

Under s 247 of the Code of Civil Procedure all that the decree-holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him. **Srimati Giribala Debia v Srimati Ravi Mina Kumari 5 C W N 497.**

C P C-O 21 r 20

Notes.—This rule seems to have been framed adopting the principle laid down in 29 Mad 318, where it has been held that a decree directing the plaintiff to recover the decreed amount by sale of properties but not directing by the defendant is essentially a decree for money. The provisions as to set-off, in S. 246, C P Code 1882 (Or XXI, r 18) will apply to such decrees. (28 Mad 476, followed; 24 Mad 412, overruled).

"This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage decrees. The rule also makes it clear that the expression "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge."—*See the Report of the Select Committee and also S. 48.*

C P C- O 21 r 21=S. 230 of 1882

Notes.—This rule exactly corresponds to para 2 of sec 230 of the C P C 1882. This rule should be read with rule 30, which lays down that decree may be executed both by attachment of person and property of the judgment-debtor.

C P C (1908) O 21 r 21=S.230 of 1882

See cases under:

(1) Execution of decree—Application for, Execution, and powers of Courts.

(2) Execution of decree—Joint decrees, Execution of and liability under.

(3) Limitation Act, 1877, Art. 179 (1871, s. 167; 1859, s. 20)—Joint decrees.

(4) Limitation Act, 1877 Art. 180.

(5) C P C O 21 r. 10.

(6) C P C S. 48.

—O 21 r 21—Decree directing performance of puja and giving of honors according to usage—Nature of the decree—Whether executable.

See C P C (1908) S. 92, Case No (1143).

2 M L J 94.

—O 21 r 21—Application to be made to Court holding assets prior to their realization.

See C P C (1908) S. 73, Case No (1060), (c).

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—O 21 r 21—Applicability and scope.

See C P C O 21 r 2, Case No 2194.

28 Mad 473

—O 21 r 21—See C P C (1908) O. 21 r 17. Case No (2453). **12 M L J 435.**

C P C O 21 r 22=S. 248 of 1882.

Notice to show cause against execution in certain cases

Notes—This rule corresponds to section 248, C P Code, 1882, with several alterations and additions. Clauses (a) (b) are almost similar to the corresponding clauses of the old section.

The wording and the language of sub rule (1) are not exactly similar to the corresponding section of the old Code, several changes in the language and phrases have been made in the present sub-rule (1) The old section has-been re-arranged by transposition of words and sentences and the meaning of the present rule has been made more clear and intelligible. No radical change seems to have been made in the meaning.

Sub-rule (2) is new. It has given full discretion to the Court to issue process in execution before issuing a notice under this rule, if for any reason the Court is satisfied that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. But before doing so, it shall have to record reason.

The addition of sub-rule (2) is no doubt an improvement and it has done away with the stringent rule which hitherto existed that omission to issue a notice under s. 248 of the old Code rendered the execution proceedings null and void (See 20 Cal. 370; 21 Cal. 19; 6 Cal 103; 3 All. 424 and 21 Bom. 424). But in 32 Bom. 572 and 28 All. 193 it has been held that non-service of notice under s. 248, C P Code, 1882, is a mere irregularity in proceedings. In order to mitigate the stringent provisions of the old section as interpreted by the case laws above referred to the Legislature seems to have added sub-rule (2) investing the Courts with discretionary powers to issue process in execution, without previous issue of notice, according to the circumstance of each case.

The explanation attached to the old section has been omitted as unnecessary in view of section 37 of the present Code, in which the expression *"Court which passed a decree"* has been clearly defined.

"The committee have omitted the reference to a decree passed in appeal, for that is ordinarily the decree to be executed.—14 *M I A 465 and 11 All 267)".—See the Report of the Special Committee .*

2463A—C P C O 21 rr 22, 23=Ss. 248, 249.

When once a Court has issued notice under O XXI, r. 22 of the Code of 1908, it has no alternative but to dispose of any objection that may have been raised on behalf of the judgment-debtor under O XXI, r. 23 of the Code.

Kallian Das v Bhawani Shankar

5 Ind Cas 546.

—C P C O 21 r 22=S. 248—Application not in accordance with law—Issue of notice —Effect—Fresh starting point. **10 Ind Cas 411.**

—C P C O 21 r 22=S 248—Judgment-debtor not apprised of notice under—Effect—Res-judicata. **13 C L J 26.**

—C P C O 21 r 22=S. 248 of 1882.

Non-service of notice on judgment-debtor—Effect of sale. **11 Ind Cas 893**

C P C (1908) O 21 r 22=(1882,S.248)

-Contd.

C P C O 21 r 22—

Execution of decree. **14 C W N 114.**

C P C O 21 r 22—Execution application made after lapse of one year from date of decree—Order for execution without issue of notice to judgment-debtor—**See** Limitation Act (1908) Art 103.

-O 21 r 22-Notice under-Whether process in execution-**See** Provincial Small Cause Act 1887, S. 17.

2464—C P C O 21 r 22=1882 Ss. 248, 223—Notice—Court which should issue:—

The notice under S. 248 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under S. 223 of the Code. The Court has a discretion whether or not it will issue a notice before ordering transmission. Ordinarily, in a case like the present, it should be left to the Court to which the decree is to be transmitted to issue the notice.— **Rajah Sreenath Roy v. Ramachandra Acharjya Chauduri, 12 C W N 897.**

2465—C P C O 21 r 22=(1882, s. 248).

Limitation—Plea of limitation regarding a previous application for execution.

Held looking to the circumstances of the case that the court could not be considered to have determined that the application was made within time.

The ruling in (8 Cal 51) cannot be extended to cases in which the judgment-debtor does not get an opportunity of putting forward a plea of limitation **Kaniz Fatima v Muhmmad Jafart Ali. 13 O C 90.**

2466—C P C O 21 r 22—Art 179 cl. (5)—Decree—Execution—Application for execution—Code of Civil Procedure, S. 248—Notice—Date of the order:—

The date of issuing a notice under S. 248 of the Civil Procedure Code is the date on which the Court orders the issue of notice and not the date on which the notice is actually issued. The limitation therefore under Art 179 cl. (5) of the second schedule to the Limitation Act runs from the former date. **Jumai Kaiyar v Abdul Karim Khan. 1908 A W N 245, 5 A L J 524.**

2467—C P C O 21 r 22—Art. 182=(1882) S. 248=(1877) S. 179.—Decree—Execution—Step in-aid—Limitation Act, Art 179 (5).

Where a notice to show cause why a decree should not be executed is issued under the provisions of S 248 of the Civil Procedure Code 1882 the time provided for by Art 179 (5) of the Limitation Act, 1877, runs from the date of the order directing the same; actual service of the notice is not necessary.

Damodar v Sonaji. [illegible] Bom L R 594=27 Bom 622.

Notes:—Diss 16 M L J 548=1 M L T 395; 10 C W N 303=4 O L J 530. Ref; 6 Bom L R 457; 460; 28 Bom 416; 30 Mad 30.=27 Bom 622.

2468—C P C O 21 r 22—Limitation Act Sch II 1908 Arts 182, 113—Issue of notice. The date of issuing a notice under S. 248, C P C referred to in Art 179 of Sch II of the Limitation Act means the date when it is actually issued and not the date when the court passes the order for issuing the notice. **Kadaressur Sen Babor v Mohim Chandra Chakravarti. 6 C W N 656.**

Notes—Fol: 10 C W N 303=4 C L J 530=16 M L J 548=I M L T 395, Ref 30 Mad 30.

2469-C P C O 21 r 22=1882, S 248-Limitation Act Art 180-Revivor-Notice without order for execution. The mere fact that an application has been made and notice has been issued to the judgment-debtor without their terminating in an order for execution cannot create a revivor of the decree within the meaning of Art 180 of the Limitation Act (6 Cal 604; 24 Cal 244 dist).

Monohar Das v Patteh Chand· 7 C W N 793 =30 Cal 979.

Notes:—Ref: 26 All 361=1904 W N 61=I A L J 80. Dist: 86 Cal 543=9 C L J 371.

C P C O 21 r 22—Written application for execution.

See C P C O 21 r 11 Case No. 2346. **5 C L J 434.**

C P C (1908) O 21 r 22=(1882,S.248)
-Concld.

—O 21 r 22—Auction sale, setting aside of—Notice under s 248, service of, object of— Objection not raised in first court.

See C P C (1908) S. 47. Case No:—(713.)
13 C L J 162.

—O 21 r 22—Order under S. 244 final between parties.

See C P C (1908) S. 47 case No:—(797.)
1 Ind Cas 284.

—O 21 r 22—Execution of decree—Power of court executing transferred decree to implead representative of deceased judgment-debtor jurisdiction of court to execute decree in excess of the limits of its pecuniary jurisdiction as an original court.

See C P C (1908) S. 47. Case No:—(203.)
70 P R 1897.

C P C (1908) O 21 r 23=S. 249 of 1882,

Procedure after issue of notice.

2470—C P C O 21 r 23=S. 249 —Petition under section, requisites of.

A petition under S. 247 Act VIII of 1859, is not required to be verified. **Gopal Chunder v. Jugut Indur Bunwaree Gobind. 8 W R, 200.**

2471—C P C O 21 r 23=S. 249=(1859,s 217) -Dismissal for non-appearance, when no day was fixed for hearing.

—Against an application for execution of a decree after notice under s 216, Act VIII of 1859, the judgment-debtor presented by his pleader certain grounds of objection, and the petition was ordered to be placed on the record. No day for hearing was fixed, but the case was called on, and, on account of the absence of his pleader, the objections of the judgment-debtor were disallowed. *Held* that, notwithstanding the absence of the pleader, the Judge should have taken the objections into consideration and passed an order under s 217.
Rajballab Shaha v Ramsaday Ghose. 5 B L R, Ap, 65: 14 W R, 155.

2472—C P C O 21 rr 23, 25—Order passed under wrong rule, effect of—Redemption, suit for—Regulation XVII of 1806 or Act IV of 1882, proceedings under, necessary to extinguish title of mortgagor—Mortgagor, effect of expunging the name of—Mortgagee, adverse possession by.

C P C (1908) O 21 r 23=(1882, S.249)
-Concld.

Where an order of remand was made virtually under order XXI, rule 23, but by a clerical mistake rule 25 was quoted; *held*, that the order was appealable. Where no steps to foreclose a mortgage had been taken, either under Regulation XVII of 1806 or under Act IV of 1882 *held*, that a suit to redeem could not be held as barred merely on the ground that the Settlement Officer had expunged the name of the mortgagor from the *Khewat* (32 Cal 396, 2 A L J 71, 1 C L J 584, 7 Bom. L R I, 9 C W N 101 Fol; 8 O C 33, Dist.)
Ange Lal v Jagdish Singh 9 Ind Cas 431.

—O 21 r 23—Order under s 244, final between parties.

See C P C (1908) S 47. Case No—(797.)
1 Ind Cas 284.

C P C O 21 r 24=S. 250 of 1882.

Process for execution.

Notes—Sub-rule (1) of this rule corresponds to sec. 250 with the omission of the words "*subject to the provisions of section* 245A, *and* 245 B" which occurred in the old section. Sub-rule (2) corresponds to first para of sec 241, C P Code, 1882, with some verbal changes.

Sub-rule(3) corresponds to first part of para 2 of s 251, C P Code, 1882; the latter portion of section 251 has been omitted and reproduced in rule (25).

See Cases under.

(1) Warrant of execution.
(2) Warrant of arrest—Civil cases.
(3) Relinquishment of omission to sue for a portion of claim.

76 P R 1890.

2473-C P C O 21 r 24 [1]=S 250-Execution of decree—Attachment of property—Judgment-debtors adjudicated insolvent and property vested in Official Assignee—Objection to attachment by judgment-debter in interests of Official Assignee—Letter from Official Assignee praying for release of property 11 and 12 Vic, C 21, Sections 7, 49—Civil Procedure Code, 1882, sections 244, 250, 278.

C P C (1908) 21 r 24 = (1882, S. 250) —Contd.

The decree-holder having, in execution of his decree, attached certain houses belonging to his judgment-debtors, the latter objected that the attachment could not take place on the ground that they had already been adjudicated insolvents at Bombay, and a vesting order with respect to all their property passed in favour of the Official Assignee. It appeared that the Official Assignee took no steps to obtain possession of the houses before attachment, and that he made no application, either personally or by duly authorized pleader or agent, for their release from attachment. On the date of the application for attachment, however, the judgment-debtors produced with their petition of objection, a letter from the said Official Assignee to the District Judge in which the latter was informed of the insolvency of the judgment-debtor and was requested to refuse attachment of their property at the instance of the decree-holder or other creditors. Subsequently the Official Assignee addressed another letter to the Judge to the effect that the claims of the Official Assignee under a vesting order were recognized by all Courts in the British Empire, and that in consequence of such order, the judgment-debtors had no saleable interest in the property sought to be attached. The first Court acting on this letter released the property from attachment, and on appeal, the Divisional Judge upheld the said order of release. The decree-holder appealed to the Chief Court, but the Official Assignee was no party to the appeal, nor had he been a party in the Divisional Court, where the appeal was lodged against and defended by the judgment-debtors, who alone conducted the objection proceedings in the first Court.

Held, that the order of release from attachment was wrong and must be set aside, the Chief Court having no discretion on an appeal to refuse to pass the order required by law.

When a decree-holder, in execution of his decree, moves the Court in accordance with law to attach property belonging to his judgment-debtor, the Court is ordinarily bound to issue process for attachment, and cannot properly refuse to do so except as provided in Section 250 Civil Procedure Code. The lower Court, therefore, could not refuse to attach merely on an informal letter from the Official Assignee, nor release the property from attachment without a formal application from him.

Held, further, that it was not competent to the judgment-debtors, who, as long as the vesting order stood, had no interest whatever in the property, to themselves make the objection either under Section 278 or any other section of the Code, or to prefer a claim or make an objection under Section 278 in the interests of the Official Assignee. **Dholan Das v Rahim Bakhsh.**

57 P [illegible] 1897.

2474—C P C O 21, r 24 [2], (3)=s. 251—Warrant—Signed by Munsarim.

Held that the munsarim has no authority to sign warrants for execution of decrees under s. 251, unless he has been actually appointed to do so by the Court. **Hulasi v Ram Din.**

7 W N 42.

2475—C P C O 21, r 24 (2), 25 (1) =(1882 s. 251)—Warrant for execution of decree—Specification of date.

It is the duty of the court to specify in a warrant for execution of decree, whether it be a decree for delivery of possession or otherwise, the day on or before which the warrant must be executed and the Commissioner has no authority to go upon the land after that date. **Abinash Chandra Aditya v Ananda Chandra Pal.**

31 Cal 424.

C P C O 21 r 25 = S. 343 of 1882.

Notes —Sub-rule (1) corresponds to first para. of s. 343 including latter part of s. 251; and sub-rule (2) corresponds to para. 2 of s. 343 of the C P Code, 1882, with some verbal changes.

—O 21 r 25—Procedure after issue of notice. **See** C P C O 21 r 23. Case No 2473.

[illegible] Ind Cas 431.

C P C (1908) O 21 r 25=(1882, S.343) -Concld.

—O 21 r 25—See C P C O 21 r 24. Case No 2475.
31 Cal 424.

C P C (1908) O 21 r 26=S. 239 of 1382

When Court may stay execution.

—O 21 r 26 [1] (2)=1882,S.239 (1859, s. 290).

See Execution of Decree—Transfer of Decree for Execution, etc

—O 21 r 26 [1] (2)=(1882) S. 239—See Decree—Alteration and amendment of decree.
61 P R 1887.

—O 21 r 26 [1] (2)=1882,S.239—See Decree—Alteration and amendment of decree.
78 P,R 1889.

—O 21 r 26-Declaratory suit and injunction—Value of suit—See C P C (1908) O 21 r 63. Case No (2568)
2 C L J 599.

C P C O 21 r 27=S. 241 of 1882.

Notes—This rule corresponds to s. 241, C P Code, 1882, with verbal changes only. The words "*order of restitution*" have been added, before the words, "or discharge."

C P C O 21 r 29=S. 243 of 1882.

Stay of execution pending suit between decree-holders & judgment-debtors.

Notes—This rule corresponds to section 243, C P Code, 1882, with some modifications. After the words "the Court may" the words, "*on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided,*" have been substituted for the words "(if it thinks fit) stay execution of the decree, either absolutely or on such terms as it thinks fit until the present suit has been decided" which occurred in the old Code. From the wording of the old section, the words (*if it thinks fit*) and the words (*either absolutely*) have been omitted. The words, (*if it thinks fit*) which occurred in the old section after the words, "the Court may" were rather superfluous. But the omission of the words "*either absolutely*" which occurred in the old section is significant.

—O 21 r 29=1882 s. 243 (1859, s. 290)

See Appeal—Orders—Case No 812.
9 Cal 214: 12 C L R 53, 10 All 389.

C P C (1908) O 21 r 29=(1882, S. 243) -Contd.

2476—C P C O 21 r 29=S. 243—Execution of decree—Suit between decree-holder and judgment-debtor—Competency of Court executing decree to stay execution pending suit.

A Court, to which a decree is transmitted for execution, has power to act under S. 243, C P Code, and has jurisdiction to stay proceedings under that section in execution of the former decree, until a suit pending in that Court between the judgment-debtor and the decree-holder is decided. (6 N W P 181, 7 All 73 and 10 All 389, Ref.) **Bhagvan Kaur v Gajindar Singh.**
130 P R 1908.

2477—C P C O 21 r 29=(1882) S. 243—Execution of decree—Stay of execution pending suit between decree-holder and judgment-debtor.

Held, that the provisions of Section 243, Civil Procedure Code, providing for stay of execution pending suit between decree-holder and judgment-debtor are confined to those cases only where the execution and the suit are pending in the same Court and between the same parties, and have no reference to a case where the suit between the judgment-debtor and the holder of the decree had been decided by the Court executing the decree and was pending in the Court of Appeal.

(6 N W P H C R, 181, 7 All 73, 10 All 389, 20 Mad 366 referred to.) **Guest v McGregor.**
41 P R 1904.

2478—C P C O 21 r 29=S. 243—Award—Enforceable as it were a decree—Stay of award pending decison of a suit between the same parties.

An award passed under the Indian Arbitration Act, 1899, can be enforced as if it were a decree of the Courts (S. 15); but the stay of its execution cannot be ordered under O XXI, r 29 of the C P C 1908. **T K Gajjar v Lallubhai Dharamchand.**
12 Bom L R 860=
[illegible] Ind Cas 179.

2479—C P C O 21 rr 29, 58, to 63=(1882 Ss. 243, 278 to 283)—Decree against father (deceased)—Execution against the sons—Objection that property was wakf-Order—Proper procedure.

Where in execution of a decree against their

C P C (1908) O 21 r 29=(1882,S.243)

-Concld.

deceased father the sons pleaded that they were hereditary trustees of the wakf.

Held that the Court could not go into the question under s. 244 Civil Procedure Code that the procedure should be to investigate the claims under Ss. 278-283, and that the order passed therein cannot be challenged by an appeal but must form the subject of a separate suit. (23 Bom 237, Fol. 23 Mad 195 Fol. 30 Mad 26 Ref. 26 Mad 31 and 28 Mad 84. *held inapplicable.*)

Budruddin Sahib v Abdul Rahim Sahib. 3 M L T 325=18 M L J 21=31 Mad 125.

—O 21 r 29—Stay of execution—Power of appellate Court—**See** C P C (1908) S. 151. Case No (1411). **82 P R 1910.**

C P C O 21 r 30=S. 254 of 1882.

Mode of Execution—Decree for payment of money.

Notes—This rule corresponds to section 254, C P Code, 1882, with some additions and alterations. The old section is reproduced here for the purpose of comparison: "*Every decree or order directing a party to pay money as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner herein after provided or by both.*"

On a comparison of the provisions of this rule with the old section it would appear that the language of the old section has to a certain extent been recast. The word *order* and the words "*as compensation or costs*" have been omitted from the present rule. The word "*order*" has been omitted because section 36 of the present Code lays down that the provisions relating to execution of decrees shall apply to execution of orders: hence it is unnecessary to retain the word "order" in the present rule. The words *compensation and costs* have been omitted because the expression "decree for payment of money" includes all sorts of decree for payment of money, except mortgage-decrees, see notes under rule 20.

Although this rule says that a decree for payment of money may be executed both by attachment and imprisonment: but it should be read with rule 31 which lays down that a Court may refuse simultaneous execution against the person and the property of the judgment-debtor.

C P C (1908) O. 21 r. 30=(1882S.254)

-Concld.

—O 21 r 30=S. 254 (1859, ss. 201,204). **See** Attachment—Attachment of person.

2480—C P C O. 21 r 30—Ss. 32, 54=Ss. 254 360, 649 of 1882 Award—Appeal—Order for refund of compensation money—Execution mode of.—

Where, in a proceeding under the Land Acquisition Act, money deposited by the Collector was paid out, as compensation to a party, by mistake, an order of the Court, directing him to refund the money so paid out, is not an award or part of an award within the meaning of S. 54 of the Act, neither does it come under any of the orders mentioned in S. 588 of the Code of Civil Procedure and no appeal, therefore, lies against such order.

The Court has jurisdiction; under Ss. 254 and 649 of the C P Code, to enforce its order for refund, by imprisonment of the party, against whom the order is made or by the attachment and sale of his property in the manner provided in the Code, or by both, even though S. 260 of the C P Code may not be applicable. (21 All 354 and 26 Mad 287, Dist.) **Nobin Kali Debi v Banalata Debi. 2 C L J 595=32 Cal 921.**

Notes—Ref: 33 Cal 927=3 C L J 67.

C P C O 21 r 31=S. 259 of 1882.

Notes—This rule corresponds to section 259, C P Code, 1882, with some additions, alterations and omissions.

In Sub-rule (1) the words "*or for the recovery of a wife*" which occurred in para, of the old section after the words, "any share in specific moveable" have been omitted: the word '*executed*' has been substituted for the word "*enforced:*" the words "*detention in the civil prison*" have been substituted for the word "imprisonment;" and the words "*imprisonment and attachment if necessary,*" which occurred in the old section after the words "or by both" have been omitted.

"The committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the

C P C (1908) O. 21 r.31=(1882,S.259)

-Contd.

law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him, which may be enforced in case of disobedience, either by the imprisonment of the defendant or by the attachment of his property, or by both."—*See the Report of the Special Committee*,

See Cases under:—
Restitution of conjugal rights.

C P C O 21, r 31=1882 S. 259—See Execution of decree—Mode of execution—Alternative decree. **13 M L J 444.**

C P C O 21, r 31=1882 S. 259—See Decree—Alteration or amendment of decree. **60 P W R 1908.**

2481—C P C O 21, r 31=S. 259 of 1882—Execution of decree—Decree for specific moveables or their value—Construction.—

The contention on behalf of the judgment-debtor in this case was that the decree was for specific moveable property which had not been ascertained and was incapable of execution. The decree provided as follows:—" It is ordered that plaintiff obtain possession as owner of jewels, clothes, shawls, trappings, dishes of sorts, cattle and other goods to the value of Rs. 30,000 in accordance with his plaint ".

Held, that on a proper construction of the decree, read with the judgment, it ordered the defendant to deliver to the plaintiff whatever moveable property she had of the kind specified in the list attached to the plaint up to Rs. 30,000 in value, and on default to pay Rs. 30,000 or such portion thereof as should represent the value of the property not delivered; and that the decree [illegible] construed was capable of execution under Section 260 of the Civil Procedure Code, if not under Section 259.— **Sardar Randheer Singh v. Sardarni Dharam Kaur. 64 P R 1890.**

2482—C P C O 21, rr 31, 58 (=C P C 1882 Ss. 259 and 278)--Scope of section not limited to attachment in order to sale.—

C P C (1908) O 21 r 31=(1882, S.259

-Concld.

There is nothing in S. 278 of the Code which limits it to cases of attachment in order to sale. It applies to seizures under S. 259 also. **Samrandass v. Makunddass. 7 C P L R 105.**

2483—C P C O 21, r 31 (=S. 259. Civ. Pro. Code, 1882)—Sale certificate is title-deed in the hands of the purchaser—Public document, a sale certificate is—Evidence Act, S. 65 (c) and (e)—Secondary evidence—

A sale certificate granted under S. 259 of Act VIII of 1859, which Act declares that " such certificate shall be taken and deemed to be valid transfer of such right, title and interest ", is a document of title. Such a sale certificate in the hands of the purchaser at an auction sale, is his title deed and he can, if he is so minded, refuse to produce it in the Court; but in that case secondary evidence of the same will be admissible under s. 65, (*e*) of the Evidence Act. *Per Candy, J.*—A certificate of sale granted under the Civ. Pro. Code is a document of title, but is not a public document under the Evidence Act [illegible] to allow secondary evidence of it to be given under S. 65, cl. (*e*) of the Act. **Vasanji v. Haribha, 2 Bom L R 533.**

—O 21 r 31—See C P C O 20 r 10. Case No. 2153. **13 M L J 444.**

C P C (1908) O 21 r 31—Step in aid of execution—Order in Council, if includes provision of decree affirmed—Payments in satisfaction of a decree made out of Court, if may be proved. —See C P C (1908) S. 47. Case No. (463). **14 C W N 357.**

C P C O 21, r. 32=(1882 S. 260.)

Notes:—In sub-rule (1) the words, *or for an injunction, has been passed*, have been substituted for the words, " or for the performance of, or abstention from, any other particular act has been made"; and the words *detention in the civil prison*, have been substituted for the word " imprisonment". By the substitution of the word "*injunction*" no change has been made in the meaning, as the word injunction is a general term and it includes restrictive as well as mandatory injunction. By restrictive injunction a person is directed either to do a particular act, or to abstain from doing the same; and by mandatory injunction a person is ordered to restore things, in their former condition. The term imprisonment is commonly used in criminal cases,and the definition of that term as given in section 3, cl. (26) of the General Clauses Act (X of 1897), means imprisonment of either description as defined in the Indian Penal Code, hence the words "*detention in the civil prison*" have been substituted for the word 'imprisonment".

Sub-rule (2) is new, there was [illegible] similar provision in the old section.

Sub-rule (3)—This sub-rule corresponds to para 2 of the old section with some verbal changes.

Sub-rule (4). This sub-rule corresponds to para 3 of the old section with sum verbal changes.

Sub-rule (5). This sub-rule is new. It has been borrowed from English Order 42, rule 30.

(1) Decree for specific performance for restitution of conjugal rights or for injunction. 2484—2502.

(1) Violation of terms of decree-Applicability of section 2484—2486.
(2) Conditions to be complied with 2487.
(3) Execution — Decree — Executing Court's powers 2488.
(4) Specific performance 2489.
(5) Informal application 2490.
(6) Decree ordering wife to return to husband 2491.
(7) Decree for possession of wife—Enforcing execution of decree. 2492—2493.
(8) Decree for performance of a particular act 2494.
(9) Decree for joint possession and management of property 2495.
(10) Opportunity of, and refusal to obey decree 2496.
(11) Decree—Execution—Order directed to an officer of the Court 2497.
(12) Execution—Decree for restoration of parnala 2498.
(13) Renewal of order contained in decree 2499.

(14) Execution of a decree for perpetual injunction, application for. 2500—2501.
(15) Possession of some property under the same decree — Compensation awarded to decree-holder 2502.

See Cases under:—

(1) Execution of Decree—Application for Execution and Powers of Court.
(2) Execution of Decree—Mode of Execution—Declaratory Decrees.
(3) Execution of Decree—Mode of Execution—Removal of buildings.
(4) Restitution of conjugal rights.

1 DECREE FOR SPECIFIC PERFORMANCE FOR RESTITUTION OF CONJUGAL RIGHTS OR FOR INJUNCTION.

(1) Violation of terms of decree —Applicability of section.

2484—C P C O 21 r 32=1882, S. 260, cl. 2—Decree restraining a person from doing an act.—

S. 260, Civ. Pro. Code, 1882, applies as well to cases where a person is restrained by decree from doing a certain act, *e. g.*, where a person, who was restrained from taking water which others carry through a *thodu*, puts up a dam and carries water in violation of the terms of the decree. **Kelu Manikaran v. Pakarvur Manakal Jatavedan Nambudris, L. R. Narayanan Somayajipad,** **21 M L J 465.**

2485—C P C O 21, r 32=S. 260 of 1882.

Where a decree enjoined the defendant not to obstruct the plaintiff's enjoyment of two drains and with regard to one of these drains the decree required the plaintiff to build it at his own cost as a pucka drain between two points and the plaintiff applied under section 260 alleging that he had been obstructed by the defendant's refusal to allow him to enter on the bund in his possession in order to build the pucka part of the drain, *held* that the two portions of the decree must be read together, that unless the plaintiff was enabled to construct the pucka drain his enjoyment thereof would be obstructed and it was this enjoyment which the defendant was required not to interfere with, that the plaintiff was entitled to access

C P C (1908) O 21 r 32=(1882 S.260) -Contd.

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Contd.*

at reasonable time and in reasonable manner to the places at which such access was requisite for reconstructing the drain: and that therefore S. 260 applied to the case. **Bapu v Narayen.** **1891 P J 317.**

2486—C P C O 21 r 32 = (1882 S. 260) —Applicability of —Breach of an injunction.

The terms of the first clause of s. 260 of the Code of C. P. (1882) clearly refer to cases where a party is restrained from doing an act, and the operation of that clause is not limited to the cases contemplated by the second clause (29 Mad 314, Fol): **Velu Manikaran v Pakarvoor. 7 M L T 227=6 Ind Cas 289 = 18 M L J 465 =M W N 1910, 157.**

(2) Conditions to be complied with.

2487—C P C 1908 O 21 r 32=S.260-Attachment—Sale.

In cases under S. 260 of the Civ. Pro. Code of 1882, a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly penal one and must be construed strictly. Under it when a sale is ordered, the following conditions must exist:—

(a) a valid original attachment;

(b) application within one year of that attachment by decree-holder for sale.

(c) lapse of one year from date of attachment.

Therefore, where an order of attachment was made on 27th June 1908 and was carried out on 20th July 1908 and no application for sale was made by 20th July 1909:

Held, that the attachment ceased to exist, and the order for sale, therefore, was set aside.

Badri Pershad v Fakira 170 P L R 1911= 10 Ind Cas 341=127 P W R 1911.

(3) Execution—Decree—Executing court's powers.

2488—C P C O 21 r 32=(1882 S. 260).

Where a decree does not contain any direction to the defendant to do or refrain from doing any act, the court executing that decree has no power to amplify its terms by calling in s. 260 C. P. C. **Alla Bakhsh v Nisar Husain. 1 A L J 541.**

(4) Specific performance.

2489—C P C O 21 r 32=S. 260. (Civil Procedure Code, 1859, S. 200.)

C P C (1908) O 21 r 32=(1882,S 260) -Contd.

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Contd.*

It is not generally within the range of a Nazir's functions personally to carry out decrees for demolitions and the like, though he may in proper cases see that the party ordered or empowered fulfils the direction given by the Court and make his report to that effect. **Mena Shri Latibkhanji v Maharana Shri Jasvatsingji** **1887 P J 74.**

(5) Informal application.

2490—C P C O 21 r 32=S. 260 of 1882.

The holder of a decree for removal of certain projecting case applied for the issue of a notice to the judgment debtor " to show cause why the projection should not be removed " on the ground that more than one year had elapsed from the date of the decree. Both the lower Courts rejected the application on the ground that it was not made in accordance with s. 260 of the Code of Civil Procedure. *Held* that though the application was not strictly accurate yet the lower Court should have issued a notice under s. 260 **Gaya Prasad v Bihari.** **3 W N 149.**

(6) Decree ordering wife to return to husband.

2491—C P C O 21 rr 33, 31 =(1882)Ss.260, 259. Enforcing decree under a suit for restitution of conjugal rights against wife.—

Quære-Whether, under the present procedure, the Court can enforce its order upon a wife to return to her husband's by giving her over bodily into her husband's hands. Such disobedience would seem to fall within s. 200 of the Code, and to be enforceable only by imprisonment, or attachment of property, or both. **Judoonath Bose v Shumsoonnissa Begum Buzloor Ruheem v Shumsoonnissa Begum.**

[illegible] W R P C 3; 11 Moore's I A 551.

Notes—See 11 M I A 551.

(7) Decree for possession of wife—Enforcing execution of decree.

2492—C P C O 21 rr 32, 31=Ss. 260, 259. Where there has been a decree in favour of an applicant for special possession of his wife, and application made for execution, the process under the ordinary sections will not be enforced.

Akbarally v Hossain Ally. 1 Ind Jur N S 101; 5 W R Mis 29.

C P C (1908) O 21 r32=(1882,S.260) —*Contd.*

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Contd.*

2493—C P C—O. 21 r. 32=S. 260 (1882)—Decree for performance of particular act—Civ. pro. *859*, s, 200.

A, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. *Held* that such conduct on the part of A was not such evidence of interference with her daughter's return as would justify the execution of the decree against her under the provisions of this section. **Ajnasi Kuar v Suraj Prasad 1 All 501.**

(8) Decree for performance of a particular act.

2494—C P C O. 21 rr. 32, 31=Ss. 260, 259.

A decree had been obtained that "the defendants do, within six weeks after the service upon them of this decree, remove the obstruction and reopen the pathway or lane leading from the north-west end of the plaintiff's house, northwards to a public road, as the same existed before the commencement of the suit and as described in the plaint." *Held* that this was a decree for the performance of a particular act on the part of the defendants, and must be executed under the provisions of s. 200, Act VIII of 1859,—*i.e.*, by imprisonment of the party or attachment of his property, or by both: therefore, an order for execution of the decree by causing the obstruction to be removed was set aside as illegal. **Bhoobun Mohun Mundul v Nobin Chunder Bullub. 10 B L R., Ap, 19: 18 W R., 282.**

(9) Decree for joint possession and management of property.

2495—C P C O. 21 rr 32, 31=Ss, 260, 259—Attachment for disobedience to decree—Civil Procedure Code, 1877, s. 260.

By a decree relating to certain joint property belonging to the plaintiff and defendant, but which had previously been held in the sole name of the defendant, it was directed that the plaintiff and

C P C (1908) O 21 r 32=(1882,S.260) —*Contd.*

(1) Decree for specific performence for restitution of conjugal rights or for injunction—*Contd.*

defendant should jointly manage the property, and that the names of both should appear in all papers connected with such property. The plaintiff subsequently applied to have his name registered in the Collectorate, but was opposed by the defendant, who, it appeared, also allowed the amlahs of the estate to continue to use his sole name. *Held* that the Court had under the circumstances jurisdiction under s. 260 of the Civil Procedure Code to attach the defendant's property until he had obeyed the decree by having the joint names of himself and the plaintiff inserted in all documents belonging to the estate. **Gouri Prosad Moitra v Bhola Nath Sanyal. 8 C L R., 487.**

(10) Opportunity of, and refusal to obey decree.

2496—C P C—O. 21 rr 32, 31=Ss 260, 259—Enforcing execution of decree.

No order for enforcing a decree by imprisonment under s. 200 of the Code of Civil Procedure should be made until the defendant has had an opportunity of obeying the decree, or has contumaciously refused to obey it. **Umed Kika v Nagindas Norotamdas. 7 Bom, H C R O C, 122**

Notes—Ap: 1 Cal 74: 24 W R 207; 11 Bom 412. Dist: 33 Bom 658. Con: 16 Bom 673. Ref: 2 Bom 624 F B; 31 Bom 23; 1 C L J 261. Diss: 33 Cal 927=3 C L J 67.

(11) Decree-Execution—Order directed to an officer of the Court.

2497—C P C—O. 21, r. 32=(1882 S.260).

A Court, in executing a decree which enjoins a party to do a particular act, *e.g.*, the removal of certain portions of his house whereby he obstructs ancient lights of the other party, has no power to pass an order empowering an officer of the Court to execute the decree by demolishing the objectionable, superstructure but it should pass an order in accordance with S 260, Civil Procedure Code.

Where, however, a Court passes such an order, the *darkhast* need not be rejected on that ground alone; but a Court of appeal can make such an

C P C (1908) O 21 r 32=(1882, S.260) -Contd.

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Contd.*

order. in its stead as the law permits.
Sakarlal v Parvatibai. **4 Bom L R 14= 26 Bom 283.**

Notes—Ref: 33 Cal 306=10 C W N 297=3 C L J 112.

(12) Execution—Decree for restoration of parnala.

2498—C P C—O. 21 r. 32=S. 260 of 1882.

Held, that a decree directing that the *parnala* in dispute be restored to its former place, should be enforced according to the provisions of Section 260, Civil Procedure Code, and not through the agency of the Nazir.Chief Court Book Circular II of 1889 referred to. **Nanun Mal v Uttam Chand.** **107 P. R., 1889.**

(13) Renewal of order contained in decree.

2499—C P C—O. 31 r. 32=S. 260 of 1882

Where a decree ordered the defendant to do a particular thing and the decree-holder's application for execution amounted to a request to renew the order contained in the decree, *held*, that the application in that form was properly rejected and that the decree-holder should have asked the assistance of the Court as provided by S 260.
Vaman v Lakshmanshet. **1890 P J 22.**

(14) Execution of a decree for perpetual injunction application for.

2500—C P C—O. 31, rr 32, 15=(1882 Ss 260, 231).

Notice to judgment-debtor, whether necessary —Execution by one of two decree-holders, without notice—Relief not prayed for, whether allowable. In executing a decree for perpetual injunction against a judgment-debtor who has deliberately disobeyed an order of Court, has tried to evade it by colourable transfers of the property and has had ample opportunities to contest the allegations of the decree-holder, the Court is not bound to issue any notice to the judgment-debtor before passing an order under section 260 of the Civil Procedure Code; nor is any notice necessary under section 231.

C P C (1908) O 21 r 32=(1882 S.260) -Contd.

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Contd.*

The rule laid down *pratap Chandra Dass* v *Peary Chowdhrain*, is not of general application.

The decree-holder is not necessarily limited to the relief asked for in his application, but may be granted other reliefs which the law allows him. (8 Cal. 174 Expl. 19 Bom. 34 Dis. 26 Bom. 187 Ref). **Durgadas Nundi v Dewaraj Agarwala,** **3 C L J 112=10 C W N 297= 33 Cal 306.**

2501—C P C O 21 r 32=(1882 s. 260)-Perpetual injunction, execution of a decree for,on each successive breach of decree—Limitation of three years from every breach—Executing Court, duty of, not to go behind the decree

On obtaining a decree for perpetual injunction the holder of it may enforce the same on each successive breach of the injunction under S. 260 of the Code and an application to so enforce it must be made under Art 178 Sch II of the Limitation Act within three years of the date of the particular breach of it which is the occasion for the application. The decree-holder however is not obliged to take action in regard to every petty infringement of the injunction on pain of allowing the decree to become altogether inoperative after three years from the date of the first petty breach and depriving the decree-holder of the fruits of his decree if a serious infringement of it were afterwards made.

Held, also, that it is not competent for an executing Court to go behind the decree.but such Court ought to give effect to the terms of the decree without attempting to read into it limitations gathered from a reference to the records of the suit in which the decree was passed.
Venkatachallam Chetty v Veerappa Pillai. **29 Mad 314.**

(15) Possession of some property under the same decree—Compensation awarded to decree-holder.

2502—C P C O 21 r 32—(1882) S. 260—Decree for specific performance—Property sold for disobedience.

The provisions of s. 260 C P C supply a primitive means of punishing disobedience and are

C P C (1908) O 21 r 32=(1882 S.260)

—Concl.

(1) Decree for specific performance for restitution of conjugal rights or for injunction—*Concld.*

not intended to be a satisfaction of the decree so as to prevent a decree-holder from taking further steps. Hence, if a successful decree-holder in a possessory suit, has under the provisions of that section received some compensation for an injury done, he can still enforce a right to possession of the property found under the decree to be his. **Ahmadi Begam v Amanat Husain. 1 A L J 431.**

C P C O 21 r 32—When enforced in a suit for accounts—Accounts, Suit for accounts. See **A W N 1905, 3=27 All 374.**

—O 21 r 32—Perpetual injunction, execution of a decree for, on each successive breach of decree—Executing Court, duty of, not to go behind the decree. See C P C (1908) S. 47. Case No. 210. **23 Mad 314.**

—O 21 r 32—Cause of action and relief in two suits different. No resjudicata. See C P C (1908) S. 47 Case No. (804) **1890 P J 72.**

C P C O 21 r 33.

Discretion of court in executing decees for restitution of conjugal rights.

See cases under—

Restitution of conjugal rights.

C P C O 21 r 34=S. 261 of 1882.

Notes.—This rule corresponds to sections 261 and 262 of the C P Code, 1882. The provisions of the two sections have been embodied in this rule, with additions, alterations and omissions.

Sub-rule (1) corresponds to para. 1 of section 261 of the old Code, with change of some words and phrases.

Sub-rule (2) corresponds to para 2 of section 261 of the old Code, with alterations and omission of some words and phrases.

Sub-rule (3) corresponds to the proviso contained in section 261 of the old Code, with several additions and alterations.

C P C (1908) O 21 r 34=(1882,S.261)

—Concl.

Sub rule (4) corresponds to paras 3 and 4 of the old section, with additions, alterations and omissions.

Sub-rule (5) corresponds to section 262 of the C P Code, 1882, with some modifications.

Sub-rule (6) is new. There was no provision in the old Code regarding registration.

Throughout this rule the word *document* has been substituted for the word "conveyance" which occurred in the old section.

"Section 261 has been recast so as to bring it into conformity with the chronological order of events, and a provision has been added to meet the requirements of the Indian Regulation Act." *—See the Report of the Special Committee.*

Decree for execution of document or endorsement of negotiable instrument.

—O. 21 r 34 (1) to (4)=ss. 261, 262. See:—Registrar of High Court.

2503—C P C O 21 r 34 (1) to (4)=S.261 (1882) —Decree for execution of conveyance—Execution of sale-deed, in accordance with decree for the same.

The appellant applied to execute his decree for execution of a sale-deed by the respondent.

A draft was produced and its terms were agreed to by the judgment-debtor. The judgment debtor, in executing it, made some alterations.

It was contended that the court could not allow the judgment-debtor to make alterations in the draft prepared in accordance with the decree, and that it should have executed the sale-deed on behalf of the judgment-debtor. *Held* that if the application were considered one under s. 261, Civil Procedure Code, as the Court did not execute the sale-deed, the application had not been complied with. If it were considered an application to compel the judgment-debtor to execute the sale-deed no such application was entertainable by the Court. *Held* further, that both the parties having considered the application as one under s. 261, Civil Procedure Code, it had not been disposed of according to law. **Swami Dayal v Sheoraj Bali. 5 O C 370.**

C P C (1908) O 21 r 35=(1882 S.263)

Decree for immoveable property.

C P C (1908) O. 21, r. 35=(1882, S. 263)-*Concld.*

Notes—Sub-rule (1) corresponds to section 263, C P Code. 1882, with some verbal changes only.

Sub-rule (2) is new. It makes provision for delivery of joint possession of immoveable property as there was no such provision in the old Code.

Sub-rule (3) is also new. The provision is made in this rule for delivery of *khas* possession by removing or opening any lock or bolt or by breaking open any door, &c., &c. In delivering possession under this sub-rule, the first thing to be seen is whether the person who refuses to vacate is bound by the decree or not. If he is not bound by the decree and is a stranger then he cannot be removed, nor his locks of doors can be broken open.

"We have carefully considered the provision as to breaking open dwelling houses, and have come to this conclusion that it should be limited to dwelling houses in the occupancy of the judgment-debtor."—*See the Report of the Special Committee.*

This rule should be read with section 146 of the Code, which provides, that where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him So under the provisions of the above section, proceedings under this rule may be taken against the representatives of a deceased judgment-debtor.

See Cases under:—

Mode of execution—Possession.

—O 21 r 35=S. 263 (1882)—Decree for delivery of possession of equity of redemption—Wrongful delivery of land—Suit by mortgagee for restitution of land so delivered. See C P C (1908) S. 47. Case No (575) **12 M L J 96.**

C P C O 21 r 36 S. 264 of 1882.

Decree for delivery of immoveable property when in occupancy of tenant.

Notes—This rule corresponds to the first para of s. 264, C P Code, 1882, with some verbal changes only. The proviso contained in the old section ran thus: *"Provided that, if the occupant can be found, a notice in writing containing such substance shall be served upon him and in such case no proclamation need be made."*

—O 21 r 36=(1882)—s. 264 (1859, s. 224)—**See** Cases under:—

Possession-Nature of Possession.

C P C (1908) O 21 r 36=(1882 S. 264) -*Concld.*

—O 21 r 36—Decree for delivery of possession of equity of redemption—Wrongful delivery of land—Suit by mortgagee for restitution of land so delivered. See C P C (1908) S. 47. Case No (575) **12 M L J 96.**

C P C (1908) O 21 r 37=(1882,S.245B)

Discretionary powers to permit judgment-debtor to show cause against detention in prison.

—O 21 r 37—S. 245-B—Revivor of decree—Issue of notice under S. 245-B—Effect. **See 11 Ind Cas 216.**

2504—O 21 r 37=C P C S 245 (B) of 1882—Arrest of judgment-debtor who has applied in other execution-proceedings under Sec. 344. of the Civil Procedure Code—Secs. 344 and 245 (B) of Civil Procedure Code.—

The Code of Civil Procedure does not prevent the Court from issuing a warrant of arrest or a notice under Section 245 (B), against a judgment-debtor who has in other execution-proceedings made an application under sec. 344 to be declared an insolvent, pending the inquiry into such application. Where, however, such judgment-debtor is brought before the court under a warrant of arrest or comes before it upon notice under S. 245 (B), the Court has a discretionary power not to put the warrant in force under Sec. 349 or not to issue it under Sec. 336 (where the requisite notification has been published by the Local Government) if the applicant furnishes security for his appearance when called upon. **Ganpat v Mahadeo. P J 1897 P 120**

—O 21 r 37—See C P C (1908) S 59. Case No. (984). **14 O C 36.**

C P C O. 21, r. 38=(1882, S. 337).

—O 21 r 38—Reversal or modification of decree on ground, common to all. See C P C O 41 r 4. Case No. 2997. **14 W R 130**

—O 21 r 38—See C P C O 41 r 4. Case No. 3006. **1 Ind Jur O S 32.**

—O 21 r 38—Arrest of judgment-debtor. **See** C P C (1908) S 55. Case No. (961). **59 P R 1898.**

—O 21 r 38—Order to furnish security in case of judgment-debtor, arrested in execution of a decree but who was applied for insolvency. **See** C P C (1908) S 55 Case No (953). **9 O C 42 B**

—O 21 r 39 cls (1) to (4)=(1882) s. 339 (1859, s. 276). Subsistence allowance. **See** Subsistence Money.

2505—O 21 r 39 (1) to (4)=S. 239 of 1882.

Civil Procedure Code 1882, Section 339 and section 36 of the Prisons Act, 1871—Correlation of—Subsistence allowance of Civil Prisoner—Clothing, bedding and cooking utensils of prisoner.

A Civil Court executing a decree under Chapter XIX, Civil Procedure Code, 1882 is not competent to require a decree-holder to supply anything but the judgment-debtor's subsistence allowance in money, which it is required to fix by Sec. 339. A Civil Court has absolutely no concern with the bedding, clothing or cooking utensils or, any other article which may be declared by the jail authorities necessary for the prisoner.

By section 36 of the Prisons Act, 1871, every Civil Prisoner unable to provide himself with sufficient clothing and bedding shall be supplied by the superintendant with such clothing and bedding as may be necessary, and the decree-holder is liable to pay to the superintendent on demand the cost of the clothing and bedding so supplied to the prisoner when he has been committed to prison in execution of a decree in favour of a private person. In default of such payment, the prisoner is to be released.

The Code and the Prisons Act are both silent as to cooking utensils and the Court has no concern with the mode in which the judgment-debtor is to be supplied with food in the jail: it has only to require the decree-holder to make provision in money for the prisoner's subsistance, **Sawan Mal v Nandu. 43 P R 1893.**

C P C O 21 r 40=S 337 of 1882

Procedure on appearance of Judgment-debtor in obedience to notice or after arrest

Notes—This rule corresponds to section 337A of the Code, 1882 with change of some words and phrases, but no change of any radical character seems to have been made in the meaning. This section was added to the C P Code of 1882, from the Debtor's Act VI of 1888, (s.4). The words "*as a trustee*" which occurred in cl. (a) of the section after the words "was bound" have been omitted from the present cl. (a); and in sub-rule (6) the words "*civil prison*" have been substituted for the words "civil jail." The other changes introduced in this rule are merely verbal.

See cases under:—

(1) Arrest—Civil Arrest. Cases No. (1, 3,)

(2) Appeal-Decrees. Case No (398).

21 Mad 29.

2506—C P C O 21 r 40 (=Civ. Pro. Code, 1882, S. 337 A)-Evidence Act Ss. 102, 106.—

The language of s. 337-A Civ Pro Code, implies apparently that the judgment-debtor has to satisfy the Court that he is unable to pay the amount of the decree from proverty or other sufficient cause. The judgment-debtor is the party who has to show the Court his right to exemption from the provisions which the judgment creditor has put in force against him. Ss 102 and 106 of the Evidence Act imply the same thing. The presumption is that the judgment-debtor has not contracted his debts without the means of paying it, and therefore if no evidence at all were given on either side the judgment-debtor would fail in his claim to exemption from the consequences of his own act. So too, the fact of the judgment-debtor's poverty must be especially within his own knowledge, and cannot be within the knowledge of the creditor except to a limited extent. **Bhaimia Ahmed Ismaljee v Kadir Set. U B R 1897-1901 Vol II 279.**

2507—O 21 r 40=(1882) s 337 A.—Surety—Execution of decree—Right of decree-holder to proceed against surety. The petitioner became a surety under s. 337 A, and not under s 336 though the judgment-debtor got leave during the proceedings to apply for insolvency, without the consent of the surety. *Held*, the surety did not thereby become party to the decree, and the decree cannot be summarily executed against him. (34 Mad 560 Refd to.) **Hari Lal v Mansa Ram. 30 P L R 1905=50 P R 1905.**

—O 21 r 40 - Surety—Executing Court had no power to receive its order releasing to surety **See** C P C (1908) S 55. Case No (973).

61 P W R 1910

C P C (1908) O 21 r 41=(1882, S. 267)

Attachment of property-Examination of Judgment debtor as to his property.

Notes.—This rule has been substituted for section 267 of the C P Code of 1882 The old section has been recast and re-arranged by several additions and alterations The main distinctions between this rule and the old section, are (1) that this rule refers to *a decree for payment of money* but the language of the old section covered all sorts of decrees.(2) This rule provides for the examination of the *judgment-debtor or any other person* but under the old section the Court had power to summon any person whom the Court thought necessary

See Cases under:-Attachment.

—O 21 r 41—Legal representatives of the judgment-debtor--Plea that the property survived to them by survivorship-Plea raised in execution proceedings.—See C P C (1908) S. 47. Case No (398). **12 Bom L R 539.**

C P C O 21 r 42=S. 255 (1882),

Notes—This rule corresponds to section 255, C P Code, with some alterations and omissions. The words, *where a decree directs an enquiry as to rents or mesne profits or any other matter*, have been substituted for the words, "if the decree be for mesne profits or any other matter, the amount of which in money is to be subsequenty determined" which occurred in the beginning of the old section. The words, *the amount of which in money is to be subsequently determined*, have been omitted. The other alterations are not material.

C P C O 21 r 43=S. 269 (1882),

Notes:—This rule corresponds to paras. I and 2 of section 269 C P Code 1882 with some additions & alterations. The words *other than agricultural produce*, have been subsituted for the words 'other than the property mentioned in the first proviso to s. 266' which occurred in para. 1 of the old section. The words "*is likely to exceed*" have been substituted for the words "will exceed" which occurred in the proviso to the old section.

The third para of section 269 which empowered the Local Government to make rules for the maintenance of the attached live-stock has been omitted probably on the ground that the High Courts have now powers to make such rules. (See ss. 122, 125, 126, 129 and 130 of Part X.)

C P C (1908) O 21 r 43=(1882 S.269) -*Concld.*

—O 21 r 43=S. 269 (1882)—Attachment of moveable property other than agricultural produce in possession of judgment debtor.

See Cases **under**—Attachment.

2508.—C P C O 21 r 43—Arts 29, 42—Suit for compensation for wrongful attachment or seizure.

Where the defendant caused a warrant of attachment to issue and the warrant was executed by affixing the court seal to the outer door of the warehouse without breaking open the door and taking physical possession of the jaggery inside: *Held* that the attachment amounted to actual seizure within the meaning of S. 269 C P C and that a suit for damages is governed by Art 29 and not by Art 42. **Multanchand Kanyalal v Bank of Madras. 27 Mad 346.**

2509.—C P C O 21 r 43=S. 269, 272.

Section 272 does not allow of an anticipatory attachment of money expected to reach the hands of a Public Officer, but applies only to monies actually in his hands.

Tulaji v Balabhai. 1896 P J 134.

—O 21 r 43.—Written appeal for execution **See** C P C O 21 r 11. Case No 2348, **21 P R 1899.**

C P C O 21 r 45.

Notes—"These provisions were inserted in Bill No 11 with the approval of the Government of India and the committee have therefore reproduced them in the present edition of the Bill." —*See the Report of the Special Committee.*

C P C O 21 r 46=S. 268 (1882),

Notes:—This rule corresponds to section 268 C P Code 1883 with some verbal changes. The words "*public company*" which occured in the old section and the last three paras of s.268, have been omitted from this rule. The provisions contained in the last three paras. of s. 268 have been embodied in rule 48 of this order with much elaboration and details of procedure.

C P C (1908) O 21 r 46=(1882, S.268) -*Contd.*

1 Attachment of debt—Share of other property not in possession of judgment debtor 2510—2519.

- **(1) Attachment of debt—Share &c 2510—2515**
- **(2) Fixing of the copy of the order and another to be sent 2515A—2517**
- **(3) Prohibiting order—Suit to recover debt —2518**
- **(4) Attachment and sale of bonds 2519.**

C P C O 21 r 46=S. 268 (1859 [illegible] 234, 236, 239, 241.)

See Cases under.

- (1) Attachment
- (2) Limitation Act 1877 S. 15.
- (3) Railway Servants Provident Fund —Attachment.

—O 21 r 46 (1)—Attachment of salary or allowance of public officer or servant of railway company a local authority—**See** C P C (1908) O [illegible] r 48. Case No (2521) **14 C L J 228.**

(1) Attachment of debt, share &c.

2510.—C P C O 21 rr 46, 52—Annuity not due, if garnishable—Anticipatory attachment of money expectant to reach the hands of public officer.

A conveyance of all properties by [illegible] person in favour of his son for the payment of his debts provided that the purchaser would pay the vendor a monthly sum of Rs. 4,000, the first payment to be made on Ist October 1905 and the payment of every succeeding month, on the first day of the month following. The deed further provided that the vendor would not by mortgage or otherwise seek to charge or alienate the allowance payable to him; and that, on no account and under no circumsances, was the allowance to become payable to or demandable by any person other than the vendor or his duly constituted attorney. There was also a provision that so far as was consistent with the then subsisting mortgage executed by the vendor himself, the allowance payable was to be a first charge upon [illegible] specified share of the estate.

A decree-holder of the vendor applied for recovery of the judgment-debt by attachment of the allowance of Rs. 4,000 from April 1910, up

to the date of realisation, and also for rateable distribution of a sum of money which had been already deposited in Court and respresented [illegible] portion of the allowance due to the judgment-debtor from November 1909 to January, 1910. He further asked that the allowance for the months of February and March, 1910, which had already accrued due might be attached and made available for the satisfaction of their dues:

Held, that an annuity, not yet due, was not garnishable under the provisions of the law, and that r 46 of O 21 of the Code was of no assistance to the decree-holder.

The term "debt" in O 21, r 46 of the Code is used in its legal sense of a debt either due or accruing due.

Rule 52 of O 21 of the Code applies only where the property to be attached is in the custody of [illegible] public officer. It does not allow of an anticipatory attachment of money expectant to reach the hands of [illegible] public officer, and is restricted only to money actually in his hands. (9 C W N 703, Dist. 22 Bom 39, Fol).

Raja Padmanund Singh v Rama Prasad Malvi. 14 C L J 127.

2511-C P C O 21 rr 46 (1) 59, 60, 61, 63, 79 (3): =(1882 S. 279, 280, 281, 283, 301, 355)—"Possession" and "Possessed"—Debt other than negotiable instrument—Attachment of—Claim by third party—Order on claim—Limitation Act, Sch II Art 11.

The term "possession" is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession and sometimes to constructive or legal possession. The word "possessed" in [illegible] 279 and the word "possession" in Ss. 280 and 281 are not restricted to merely tangible or physical possession but include constructive possession or possession in law of debts and other intangible property. A debt may be attached under Ss. 266, and 268, and a claim may be preferred against the attachment and investigated under s. 278, and [illegible] order passed in such claim under s. 283 C P C, will be subject to the operation of s. 283, C P C, and Art 11 of Sch II of Act XV of 1877 (Limitation Act). (24 Mad 20 overruled.) The word "possess" in [illegible] 355 C P C., is applicable not only to

C P C (1908) O 21 r 46=(1882 S.268) - *Contd.*

(1) Attachment of debt—Share of other property not in possession of judgment debtor—*Contd.*

tangible property but also to debts and other intangible property. **Chidambara Patter v Ramasami Patter.** **27 Mad 67= 13 M L J 467; F B.**

2512—C P C O 21 r 46 (1)=(1882 S. 268).

Held, that for the purposes of s. 268, C P C., a mortgage debt is not immoveable but moveable property. (58 P R 1899, Ref. 9 Mad 5, not Fol: 18 Mad 437; 19 Bom 31; 13 Cal 516; 20 Cal 805; 23 Cal 450 and 6 C W N 5 Fol.) **Bantu v Ganda Singh. 18 P R 1909=22 P W R 1909= 1 Ind Cas 450.**

2513—C P C O 21, rr 46 (1), 54=1882 Sections 268 and 274—Mortgage debt, nature of—Moveable and immoveable property—Mode of attaching and selling a mortgage debt in execution—Effect of sale of mortgage debt in execution.

A mortgage debt is moveable property within the meaning of section 268 Civil Procedure Code; and its sale in execution by public auction carries with it the right to proceed against the mortgaged property even though there may have been no attachment and sale under section 274.

Where a mortgage debt had been attached in execution under section 268 Civil Procedure Code and sold under section 297. *Held* that the Court had no jurisdiction to set aside the sale.

Tarvadi Bholanath Harishanker v Bai Kashi (1902) 26 Bom 305.

2514—C P C O 21 rr 46, (1), 58=(1182 Ss. 268, & 278).

Section 278 Civil Procedure Code applies to specific moveable property attached by prohibitory order under section 268. (4 Bom 323; 22 W R 36 and 24 Mad 20 ref). **Kesheorao Kunbi v Muka Teli. 14 C P L R 124**

2515—C P C O 21 r 46 (1)=(1882 S. 268)—Prohibitory order—Submisson to—Mistake of fact—Subsequent refusal to remit.

Where an officer submitted to a prohibitory order under S. 268 and held in deposit the amount that fell due to the judgment-debtor under a mistake of fact as to the Court from which the order emanated and afterwards found that the Court which issued the prohibitory order, was not competent to do so, he will be justified in subsequently refusing to remit the money to the Court which issued the illegal order. **Abdul Gafur v Albyn 7 C W N 821=30 Cal 713.**

C P C (1908) O 21 r 46=(1882, S.268) —*Contd.*

(1) Attachment of debt—Share of other property not in possession of judgment-debtor—*Contd.*

Notes—Fol: 5 Bom L R 803=28 Bom 198.

(2) Fixing of the copy of the order & another to be sent.

2515A—C P C O 21 r 46 (2)=ss. 268, 484, 486, 492—Attachment—Debt—Garnishee order—Delivery of cheque to creditor—Effect of subsequent receipt of attachment order—stopping payment—Failure to affix copy of order in Court house—Effect. **See 12 Ind Cas 869.**

2516—C P C O 21, rr 46 (2) 54; S. 64=(1882—Ss. 268, 274, 276)—'Shall be fixed'—Attachment of mortgage debt—Copy of order not affixed in Court-house—Illegality.

A mortgage-debt was attached, but no copy of the attachment order was affixed in the Court-house as required by S. 268, C P C. *Held*, that the plaintiff who took an assignment of the mortgage bond four days after the order of attachment acquired a valid title, the attachment being ineffectual. **Satya Charan Mukherji v Madhub Chunder Karmokar. 9 C W N 693.**

2517—C P C O 21, r 46 (2)=(1882 S. 268)—Decree—Execution—Attachment of salary—Prohibitory order—Railway servants—Salaries—Small Cause Court—Jurisdiction.

Where a Railway servant resides, works for gain and receives his salary within the local jurisdiction of the Court that passed the decree and the disbursing officer holds his office beyond the local jurisdiction of the Court, the Court cannot attach the salary that fell due and that was to fall due, by a prohibitory order, under S. 268 of the C P C issued to disbursing officer.

Sayadkhan v Davies. 5 Bom L R 803= 28 Bom 198.

(3) Prohibiting order-Suit to recover debt.

2518—C P C O 21, r 46 (3) (=old s. 268)—Prohibiting order—Suit to recover debt.

A suit against a debtor to recover a debt will not be barred by the fact that the Court made a written order in execution of a decree under s. 268 Civ Pro Code, 1882, prohibiting a creditor from recovering such debt and the debtor from making

C P C (1908) O 21 r 46=(1882, S. 268) —Concld.

(1) Attachment of debt—Share of other property not in possession of judgment-debtor—Concld.

payment thereof until further orders. (13 All 76 Ref). **Nandu v Sundar.** **142 P R 1894.**

(4) Attachment and sale of bonds.

2519—C P C O 21 r 46=S. 268 (1882).

Under the provisions of s. 268 of the Code of Civil Procedure (Act X of 1877), bonds cannot be sold till the end of six months from the date of attachment. **Nursing Das Raghunath Das v Tulsiram Bin Doulatram.** **2 Bom 558**

—O 21 r 46—Attachment—Debt—Monthly allowance of 'debt'—Contingent and existing debt—Debt payable in future—**See** C P C (1908) S. 60. Case No (990). **9 C W N 703.**

C P C O 21 r 48

Attachment of salary or allowance of public officer or servant of railway company or local authority

Notes.—This rule is not altogether new. It has embodied the provisions contained in the last three paras of sec. 268, C P Code 1882, with several additions and alterations. This rule has laid down in detail the procedure to be followed when the property to be attached is, the salary or allowances of a public officer or of a servant of a Railway Company or local authority. This rule has removed the difficulty which hitherto existed in attaching the salary of a public officer or of a Railway servant, where the judgment-debtor or the disbursing officer was not residing within the local limits of the Court's jurisdiction. Under the present rule the Court has full power to attach the salary of a public officer or of a Railway servant, although he or the disbursing officer may live beyond the local limits of its jurisdiction. There was some conflict of judicial opinions with regard to Court's jurisdiction to make an order of attachment of salaries of public officers or of railway servants, outside the local limits of its jurisdiction but this rule has settled the point, and has overridden the law laid down in 30 Cal 713: 7 C W N 881; and in 28 Bom 198,

2520.—C P C 1908 O 21, r 48—Debt payable to judgment-debtor by non-resident outside jurisdiction, it may be attached—Execution.

C P C (1908) O 21 r 48-Concld.

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor by a non resident outside the jurisdiction. **Begg Dunlop & Co v. Jagannath Marwari.** **16 C W N 402=39 Cal 104.**

2521.—C P C O 21 r 48—Debt, attachment of—Debt payable by non-resident outside jurisdiction—Executing Court, power of, to execute decree outside jurisdiction—Precept, object of.

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor by a non-resident, outside the jurisdiction.

One of the exceptions recognised to the general rule that no Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction, is in cases of decrees for sale of mortgaged properties; others have been recognised by the new Civ Pro Code in cases of attachment of salaries of public officers under O 21, r 48, and of sale of an entire estate, situated within the local limits of the jurisdiction of more Courts than one, under r 3 of O 21.

Obiter:—The object of a precept is to enable a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. **Begg Dunlop & Co v Jagannath Marwari.** **14 C L J 228=11 Ind Cas 417.**

C P C O 21 r 49

Notes.—This rule is new. It has been taken from 53 and 54 Vict., 39 s. 29 and from English Order 46, rr 1a 1b.

C P C O 21 r 50

Notes.—This rule is new. It has been taken from English Order 48*a*, r 8 Section 247 of the Contract Act (IX of 1872) runs thus: "*A person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of the partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.*"

C P C (1908) O 21 r. 50-*Concld.*

C P C(1908) O 21 r 50-Property attached—Legal representative-Plea that property attached is trust-property—Appeal-Execution of decree. **See** C P C (1908) S. 47. Case No 173. **12 Ind Cas 411.**

-O 21 r 51 (1908)=S 270 (1882).

See Cases under:—
Attachment.

C P C O 21 r 52=S 272 of 1882

Attachment of property in Custody of Court or public officer.

Notes.—This rule corresponds to section 272, C P Code. 1882, with some verbal changes. The words "*be deposited*" which occurred in the old section have been omitted. The other changes are not material.

C P C O 21 r 52 S. 88—Contract Act 1882, Ss. 2, 37, 38. **4 M L T 235.**

2522—C P C O 21 r 52(=S. 272 C P C 1882) —Scope of—S. 272 is applicable only to cases where the property is in the custody of a court or public officer, and belongs to the judgment-debtor, and not where it has been declared to belong to the plaintiff. The remedy in such case is to sue to recover possession.
Raja Padmanund Singh v Chandi Dat Jha. 1 C W N 170.

2523.—C P C O 31 r 52=1882 S. 272—Court of Justice—Deputy Collector's Court.—

The Court of a Deputy Collector was a Court of Justice within the meaning of s. 237, Act VIII of 1859. **Cowie v. Elias 10 W R 43.**

2524.—C P C O 21 r 52=S. 272—Application for money deposited in Court—Question for Court executing decree—Separate suit.—

The plaintiffs, having obtained decrees on certain hundis against *K* and *P*, applied under Act VIII of 1859, s. 237 for payment of certain moneys which had been deposited in Court in a suit in which one *D* was the plaintiff, and which had been attached by them. The ground of their application was that *D* had recovered a decree on certain hundis which had been fraudulently transferred to him by K and *P*. The Munsif, holding that the question of the ownership of the decree could not be determined in the miscellaneous department, referred the applicants to regular suits. These were accordingly instituted, and the transfer to *D* declared to be fraudulent and colourable. *Held* that the question of the title of the plaintiffs as against *D* to have their debt paid out of the money in deposit ought to have been decided in the Court in which the money was in deposit. The Munsif was in error in directing the applicants to a regular suit. **Debee Pershad v Gujadhur Ram 20 W R 73.**

C P C (1908 O 21 r 52=(1882, S.272) -*Concld.*

Notes:—Con: 19 Bom 710.

—O 21 r 52—Attachment of debt, share etc. **See** C P C (1908) O 21 r 46 cl (1). Case No. (2510) **14 C L J 127.**

C P C O. 21, r. 53=S 273 of 1882.

Notes.—This rule corresponds to section 273, C P Code, with several additions and alterations. The most important change is the addition of the words "*or for sale in enforcement of a mortgage or charge*" in sub-rule (1). The present rule has been made applicable to money-decrees as well as to mortgage-decrees. The addition seems to have been made to meet the cases in which it has been held that a decree upon a mortgage is not a money-decree within the meaning of section 273 of the old Code. The old section has been recast and re-arranged, and it has been enlarged by addition of some clauses to make the procedure more clear and intelligible. The changes are principally confined to the details of procedure to be followed in attaching a decree.

Sub-rules (2), (3) and (6), cl (*a*) of sub-rule (1) are new. The changes introduced in the other sub-rules and clauses are not material.

1 Attachment of decrees.

1 Attachment already made—Applicability 2525.
2 A decree in a suit for dissolution of partnership—Money decree 2526.
3 Decree for money—Mortgage-decree a decree for money 2527.
4 Money-decree 2528—2530B.
5 Decree for sale on mortgage 2531.

C P C (1908) O 21 r 53=(1882,S.273) *-Contd.*

6 Decree cannot be sold in execution of [illegible] decree 2532

7 Money-decree-Right to recover mesne profits 2533—2534.

8 Assignment of decree—Application by assignee 2535—2536.

9 Mortgage-decree-holder is a representative 2537.

10 Attachment of [illegible] decree by a notice from another Court 2538.

11 Attachment of decree — Effect of—Decree-holder's right to apply for execution 2539.

1 ATTACHMENT OF DECREES.

C P C (1908) O 21, r. 53=(1882) S. 273.

See Attachment—Subjects of Attachment—Decrees.

C P C O 21, r 53=S. 273 (1882)—See (1) Right of suit. **7 M L T 143.**

(2) C P C O 21, r 16. Case No. (2417). **2 Ind Cas 626.**

(1) Attachment already made-Applicability.

2525—C P C O 21, r 53=S. 273 of 1882—

O 21, r 53, cl.6 applies also to cases where the attachment was already made.

Gorgala Venkayya v. Mugunta Lakshmiah, 22 M L J 394.

(2) A decree in [illegible] suit for dissolution of partnership—Money-decree.

2526—C P C O 21, r 53=(1882 S. 273).—A decree in a suit for dissolution of partnership is, for the purposes of execution, to be regarded as a money-decree. It can be attached but cannot be sold; and the only remedy respecting it is the procedure under [illegible] 273, Civil Procedure Code, 1882. **Sidlingaya v. Shankarapa, 5 Bom L [illegible] 529=27 Bom 556.**

(3) Decree for money—Mortgage-decree, [illegible] decree for money.

2527—C P C O 21, r 53=(1882 Sec. 273).—An ordinary mortgage-decree is not [illegible] decree for money within section 273 of the Code of Civil Procedure. **Macnaghten v. Surja Prasad, 11 C L J 78=5 Ind Cas 302.**

(4) Money-decree.

2528—C P C O 21, r 53=(1882 S. 273)—Decree [illegible] a mortgage—Applicability of s. 273.

A decree upon a mortgage is not a money-decree within the provisions of S. 273.

Baij Nath Lohea v. Binoyendra Nath Palit, 6 C W N 5.

Notes:—Ref: 28 All 771 F B=1 M L T 247=3 A L J 585=(1906) W N 237. Fol: 12 C W N 625; 2 C L J 499.

2529—C P C O 21, r. 53=(1882, S. 273)—Attachment of decree for money-Decree for foreclosure—Procedure—Execution of decree.

Where on application to a Court which was not the Court which passed it, a decree for foreclosure was attached by a creditor of the decree-holder, it was held that it was not competent to the Court which passed the decree to follow up the attachment by substituting the name of the attaching creditor in place of that of the decree-holder. **Brahma Din v. Braji Lal, 1903 A W N 206=26 All 91.**

Notes:—Ref: 28 All 771 F B=3 A L J 385=1 M L T 247=(1906) W N 237.

2530—C P C O 21 rr 53, 16—S. 60=(1882, Ss. 273, 232, 266, 281)—Transfer of Property Act (IV of 1882), S. 89 — Civil rules of Practice, Rule 184—Mortgage-decree, sale of, in execution, whether valid, and passes title to the purchaser—Mortgage decree how far [illegible] money-decree—Transfer of Property Act, scope of—Civ. Pro. Code, S. 273, scope of — Jurisdiction of Courts, in the absence of specific provisions.

On the application of C, the Lower Court passed an order allowing execution of [illegible] mortgage decrees against the appellants which were obtained by N and purchased by C, C sought to execute them at a Court auction-sale held in pursuance of [illegible] decree in another suit instituted by C against N to enforce a hypothecation bond by which N had pledged as security the mortgage decrees which he held.

Held, that the petition of C for execution of

C P C (1908) O 21 r 53=(1882, S.273) -Contd.

(1) Attachment of decrees-*Contd.*

the mortgage decree obtained by N had been rightly allowed by the Lower Court.

Per Abdur Rahim, J.—Whether a mortgage decree which directs the payment of a certain ■ of money as well as the sale of the mortgaged property is to be regarded as a money-decree depends on the connection in which the question arises. For the purpose of section 273, however, ■ decree for money which is sought to be attached in execution includes ■ decree upon a mortgage and the effect of S. 273 is to prohibit the sale of ■ decree for money which had been attached in execution. But it would be extending the application of the section, if it is to be held that it has the effect of rendering the sale of a decree for money held in execution altogether invalid and without jurisdiction. That section which merely enacts ■ rule of procedure cannot be accorded a scope which would indirectly affect an important question relating to the right of the decree-holder to deal with his rights under the decree.

Section 232 recognises the validity of a pledge of a decree as security no less than the validity of its sale and there is nothing in reason why, if a decree-holder can sell his decree, he cannot make it security for his debts. It follows therefore that if there is nothing in the law to prevent the decree-holder from pledging, his decree ■ a collateral security, it must be within the competence of the Court which is asked to enforce such a contract to order the sale of the property pledged. (25 Mad 244. Ex. 28 Mad 473; 28 Bom 630; 26 Cal 839; 16 All 259 Ref: 2 All 290; 6 Mad 418; 20 Cal 111; 16 Bom 522 Ref: 9 All 46; 5 All 142 (157) (P C); 10 Bom 444 Ref: 6 Mad 418 Dist:) **Subbaraya Rowthu Minda Nainar v. Kuppusawmy Aiyangar, 5 M L T 278=1 Ind Cas 535.**

2530A—C P C O 21, rr. 53, 54, 89=(1882) S. 273—Application to set aside sale—Decree on foot of a mortgage — Whether moveable or immoveable property.

O 21, rr. 53 and 54 of the Civ. Pro. Code, make it quite clear that ■ decree for sale in enforcement of a mortgage is not to be regarded ■ immoveable property within the meaning of that order. **Surbani v Puran Singh, 8 A L J 1327.**

C P C (1908) O 21 r 53=(1882, S.273) -Contd.

(1) Attachment of decrees-*Contd.*

(5) Decree for sale on mortgage.

2531—C P C O 21, r 53=(1882-Section 273) —Attachable in execution.

A decree for sale upon a mortgage is not a decree for money and can be attached and sold in execution of ■ money decree under the penultimate clause of section 273 of the Code of Civil Procedure. (A W N 1885 P. 123 Overruled; A W N 1893, P. 184, 27 All 501; 4 C W N 35; 6 C W N 5; 26 All 91. Referred to; 28 Mad 214, Not followed. 2 All 290. Referred to.) **Delhi London Bank, Ld. v. Kunwar Partap Singh *(F B)*, 1 M L T 247=28 All 771=1906 W N 236=3 A L J 585.**

(6) Decree cannot be sold in execution of ■ decree.

2532—C P C O 21, r 53=C P C S.273 of 1882 —Sale of decree.

Held that a decree cannot be sold in execution of a decree. The decree-holder may proceed under s. 273. (2 All 290 followed.) **Takiya Begam v Siraj-ud-daulah. 5 W N 123.**

(7) Money decree—Right to recover mesne profits.

2533—C P C O 21 r 53; S 144 (1) =(1882 ss. 273, 583):—A right to recover mesne profits by way of restitution is not a decree for money, and so cannot be attached as such. S 273 C P C applies only to cases where the right attached is one expressly settled by the decree. *Semble:* If summary order under s 583, C P C, awarding mesne profits is passed prior to the attachment, it might be a decree under S 273, C P, C. **Vasudeva Rai Varman v. Narayana Patter. 24 Mad 342.**

2534—C P C O 21 rr 53.8=C P C Ss 273, 258. Decree for mesne profits—attachment of—Bringing in representative of judgment-debtor deceased before further execution—Entering up satisfaction of decree after its attachment.

Held, that (1) a decree for unascertained mesne profits is a decree for money and may be attached in the mode provided by S 273; (2). The holder of ■ decree for money is entitled to

C P C (1908) O 21 r 53=(1882, S.273) -*Contd.*

(1) Attachment of decrees-*Contd.*

execute it by attachment of another decree in favour of the judgment-debtor after his death if he has brought the representative of such judgment-debtor upon the record in the execution proceedings connected with his decree; (3) the holder of a decree that is attached may certify satisfaction of the decree under S 258 after the attachment, if the payment or adjstment was made *bona fide* and before the attachment.

Ramasami Aiyar v. Ramaiyar. 2 M L J 288.

C P C 1608 O 21 r 53—attachment of decree—Rights of attaching creditor and original decree-holder. **9 M L T 312=21 M L J 577 =9 Ind Cas 786.**

C P C 1908 O 21 r 53—Right of pre-emptor to execute decree in favour of the vendee. **8 O C 186.**

(8) Assignment of decree—Application by Assignee.

2535—C P C O 21 r 53=(1882 S. 273)—Assignment of decree—Attachment, effect of, on execution application by assignee:-Where a decree of the District Court was transferred to the appellant and he applied to the District Court for the execution of the decree and his application was rejected on the ground that it was meanwhile attached under S 273 of the C P C by the District Munsiff's Court.

Held, that the order was right and the only remedy open to the transferee was to prefer a claim petition to the attaching Court.

Chillaloor Verra Musala Reddi v. Pathangi Ramaiya 7 M L T 88.

2536-C P C 1908 O 21 r 53=(1882) S.273 Execution of the attached decree-Persons entitled to apply—Assignee decree-holder.

Under O 21 r 53, Civ. Pro. Code, Court receiving a notice of attachment of its decree from another Court is bound to stay execution of its decree until the attaching Court cancels the notice or the holder of the attached decree applies for execution. Under that rule, the only two persons who can take out execution are the holder of the attached decree or the attaching creditor. The assignee from the holder of the attached decree cannot apply for execution of the attached decree.

Thirvengadam Pillai v. Doredla Subbiah. (1912) 1 M W N 176=11 M L T 144=13 Ind Cas 659.

C P C (1908) O 21 r 53=(1882, S 273) -*Contd.*

(1) Attachment of decrees-*Contd.*

(9) Mortgage decree-holder is a representative.

2537—C P C 1908 O 21 r 53=1882 S. 273. S. 273 lays down that the holder of a decree sought to be executed by the attachment of another decree for sale, in enforcement of a mortgage or charge, shall, as the representative of the holder of the attached decree, be entitled to execute such attached decree in any manner lawful to the holder thereof.

The mortgage-interest under the decree includes the right to sell the property in default of payment, and no order for sale of that decree is necessary in order to enable the mortgage-decree-holder to sell it. (5 M L T 278;26 Bom 305; (1910) M W N 4, Ref). **Kuppusami Iyengar v. Subbaraya Ravutha Munda Nainar, (1912) I M W N 1=11 M L T 15=22 M L J 161=13 Ind Cas 224.**

(10) Attachment of a decree by [illegible] notice from another Court.

2538-C P C O 21 rr 53, 68=(1882 s. 273 and 290)—Execution sale under the decree attached invalid—Irregularity.

When a Court receives an order from another Court for attaching a decree of the former, it is bound to do so, and cannot refer the matter back for further information [illegible] to the amount under execution. If it proceeds to execute the decree in spite of the order under section 273 of the Civil Procedure Code and sells any property in execution, the procedure is not merely irregular but wholly void, and the sale must be set aside. **Manik Lal Seal v. Bonomali Mukherji 3 C L J 27=10 C W N 193=32 Cal 1104.**

(11) Attachment of decree-Effect of-Decree-holder's right to apply for execution.

2539-C P C O 21 r 53=S 273 (1882)—Limitation Act. Sch 11 Art, 179, Cl, (2)—Application in accordance with law. S 273 of the Civil Procedure Code does not render the decree attached

C P C (1908) O 21 r 53=(1882 S.273) -*Contd.*

(1) Attachment of decrees *Contd*

under it permanently incapable of execution and does not destroy the decree-holder's interest in the decree attached. It merely operates as a stay of execution unless and until the events mentioned therein take place, and delays the realisation of the decree by the decree-holder. An application for execution of a decree by the decree-holder when his decree has been attached and while the attachment is yet subsisting is one in accordance with law and keeps the decree alive and a subsequent application made within 3 years of such last mentioned application is not barred by Art. 179 Cl. (2) Limitation Act.

Patuma v Idivi Beari **13 M L J 265.**

C P C O 21 r 53—Decree for the payment of money against several persons transferred to one of them.

See C P C O 21 r 16. Case No. (2417).

6 A L J 564.

C P C O 21 r 53—Mortgage of decree by decree-holder—Attachment of decree on [illegible] date by decree-holder's creditor—Subsequent attachment by other creditors-Priority.

See C P C (1908) s. 47. Case No. (603).

33 Mad 429.

C P C O 21 r 53—Transfer under s. 232 when complete—Duties of Executing Court and transferee decree-holder.

See C P C (1908) O 21 r 16. Case No. (2381)

6 M L T 273.

C P C O 21 r 54=S 274 of 1882.

Attachment of immoveable property.

Notes—This rule corresponds to section 274, C. P. Code, 1882, with some modifications. The words, *from taking any benefit from such transfer or charge*, have been substituted in sub-rule (1) for the words "from receiving the same from him by purchase, gift or otherwise," which occurred in para 1 of the old section. In sub-rule (2) the words *and then upon a conspicuous part*, have been added after the words 'conspicuous part of the property.' The above addition seems to have been made in accordance with the law as interpreted in 7 Cal 34: 8 C L R 369 and to override the case reported in 4 All. 300, in which a different view

C P C (1908) O 21 r.54=(1882,S.274) -*Contd.*

seems to have been taken. The other changes are mere verbal.

See Cases under:—

- (1) Attachment—Mode of Attachment and irregularities in attachment.
- (2) Process, Service of.
- (3) Transfer of Property Act s. 6;
- (4) Relinquishment or omission to sue for portion of claim.

2540—C P C—O. 21. r. 54=S.274 (1882)—Notice to judgment-debtor—Personal service.

Under s. 274 of the Code of Civil Procedure it is not necessary that notice should be served on the judgment-debtor personally. When the order of attachment has been promulgated under the section, 276 comes into play and makes void any transfer within its terms pending the attachment as against all claims enforceable under the attachment. **Babu Lal v Narain Das.**

9 W N 132.

2541—C P C—O. 21, rr. 54, 92(=Ss. 274, 314, Civ. Pro, Code, 1882)-Sale proclamation-Service, if should be in every part of the property-Value, Statment of, if material—"Property."

The statement in the sale proclamation of a value which proves to be inadequate is an irregularity but not a material irregularity. Such statements are made without much consideration and it is well known that purchasers do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold. S. 274 of the Civ. Pro. Code, does not require that the sale-proclamation should be served in each of the villages comprised in the property to be sold. The word "property" in that section evidently refers to each "lot" to be sold separately from the rest. Though it is a sound rule to follow, *viz.*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, the fact, that the processes

C P C (1908) O 21 r 54=(1882, S.274) –*Concld.*

were not served in each does not necessarily constitute an infringement of the provisions of s. 274, Civ. Pro. Code. (11 Cal. 74, 12 Bom 368, *Commented on*). **Moulvi Abdul Kashem v Benoje Lal Dhone.** **12 C W N 757.**

2542—C P C—O. 21, r. 54 (=old s. 274)—Compliance with—Proclamation—Notice.

For the purposes of old s. 274, Civ. Pro. Code, it is sufficient if the notice of the attachment of the property is given by beat of drum on the spot and by affixing a notice on the house of the judgment-debtor, situate on the spot. The rulings in 1 B. L. R. S. N. 20 and 2 All 58 should not be strictly applied in Punjab. **Sunder Singh v Jiwan Ram.** **88 P R 1898.**

2543—C P C—O. 21, r. 54—Attachment—Mortgaged debt—Moveable property.

The provisions of O. 21, r. 54 of the Civ. Pro. Code do not apply to property of the nature of debt secured by a hypothecation bond (15 All 134, Ref.). There are several difficulties of a practical nature in the way of holding mortgaged debts to be immoveable property for the purpose of attachment. (26 Bom. 305, Ref.). The preponderance of judicial opinion is in favour of the view that mortgaged debts are moveable properties. (12 Cal. 546, 20 Cal. 805, 6 C. W. N. 5, 19 Bom. 121, Ref.). The opinion of the Madras High Court has been fluctuating, but the present view has the support of the views of the other High Courts. (9 Mad 5, 10 Mad 169, 13 Mad 437, 8 M L J 1, Ref).

Nataraja Aiyar v The South Indian Bank Ltd., Tinnevelly. **1911, 2 M W N 590= 10 M L T 503.**

—O 21 r 54.—See Attachment—Subjects of Attachment-Debts. **26 Bom 305.**

—O 21 r. 54—Decree for money—Mortgage-decree, a decree for money. **See** C. P C (1908) O. 21 r. 53. Case No (2530B). **[illegible] A L J 1327.**

—O 21 r 54—Fixing of the copy of the order and another to be sent. **See** C. P. C. (1908) O. 21 r. 46 (2) Case No (2516). **9 C W N 693.**

—O 21 r 54—Mortgage is not immoveable, but moveable property. **See** C P C (1908) O. 21 r. 96 (1) Case No (2513). **18 P R 1909.**

C P C (1908) O 21 r 55=S. 275 of 1882

Notes—This section corresponds to section 275 C P Code 1882 with some additions and alterations. The lines "*the attachment shall be deemed to be withdrawn and in the case of immoveable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule*" have been substituted for the sentence "an order shall be issued on the application of any person interested in the property, for the withdrawal of the attachment which occurred in the old section. Under the old section it was necessary to make an application to issue an order for withdrawal of attachment; but under the present rule, *the attachment shall be deemed to be withdrawn.* With regard to the issue of a proclamation of withdrawal of attachment, it is optional with the judgment-debtor to make an application for the same. On the happening of any of the events mentioned in clause (a) (b) or (c) the attachment shall be deemed to be withdrawn, without any further action on the part of the judgment-debtor.

C P C (1908) O 21 r 55=S. 275.

Removal of attachment after satisfaction of decree.

2544.—C P C O 21 r 55=(1882) s. 275 (1859 s. 245)—Tender of amount of decree—Stay of execution.

Under s. 245 of Act VIII of 1859, the mere tender of money before the Judge is not sufficient to entitle the judgment-debtor to have the sale of his property stayed, and the law contemplates that payments should be made in accordance with the rules and forms of Courts. **Huronauth-Roy v Indoobooshun Deb Roy.** **2 Hay 302.**

2545.—C P C O 21 r 55=(1882) S. 275.—Attachment withdrawn—Claims can not be considered—Judgment-debtor has locus standi in such inquiry.

Certain property was attached in execution. Y applied to have the property sold subject to his mortgage. Notices were issued to the judgment-creditor and to the judgment-debtor L. While this inquiry was pending the judgment debt was paid to the judg-

C P C (1908) O 21 r 55=(1882,S.275) -Concld

ment-creditor and the attachment was withdrawn. *Held*, that the Court had no power after the withdrawal of the attachment to enquire into the rights of the parties under the mortgage and pass an order declaring the property to be subject to the mortgage; that it could merely pass an order as to the costs incurred; that L who had been made a party to the inquiry and who claimed an interest in the property, had a *locus standi* in the present application. **Lakshman v Yamaji.** **1896 P J 304.**

—O. 21 r 55—Sanction to prosecute, **4 Ind Cas 97=6 M L T 376.**

—O. 21 r 55—U. P. Act XVII of 1876, s. 74 **2 O C 359.**

C P C (1908) O 21 r 55—Auction-purchaser **See** C P C (1908) S. 47. Case No (294). **9 Ind Cas 472.**

—O 21 r 55—Decree-Execution-Application by another decree-holder under S. 295 for rateable distribution—Proceedings transferred to the Collector—Refusal to set aside sale.—**See C P C** (1908) S. 47 *Case* No (537) **13 Bom L R 1193**

C P C O 21 r 56=S. 277 of 1882.

Notes—This rule corresponds to section 277 C P Code 1882 with some verbal changes. The word '*where* has been substituted for the word "if" in the beginning; and the word *current* has been added before the word 'coin'. The effect of the addition of the word *current* is that if the coins attached be not current coins, then they cannot be paid over to the decree holder, but should be sold, as other moveable properties.

C P C O 21 r 57.

Determination of attachment.

Notes—This rule is new and the object of framing this rule will appear from the following Report of the Special Committee: "The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file" for which there is no justification in the Code".

This rule has been inserted to set at rest a long

C P C (1908) 21 r 57-*Contd.*

mooted point upon which there was much diversity of judicial opinion. The conflicting rulings on the point are collected under s. 64 of the present Code and its cross-references and this rule has overriden all those cases in which a view contrary to this rule has been expressed. The effect of this rule would be that all previous attachments shall cease with the dismissal of an application for execution and, the judgment debtor will get sufficient opportunity to make a private alienation, of his property if once an execution case be dismissed under this rule. This rule has put some difficulty in the way of decree-holders realizing money. Under the old Code it was settled by a long course of decisions that, when property has once been attached, in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment, will not have the effect of raising the attachment. *Quære* - Although upon the dismissal of an application for execution the attachment shall cease under this rule; but - whether the Court under the powers vested in it by section 151 of the Code and under the circumstances of any particular case, and for the ends of justice, can make special order maintaining the attachment where it considers that the judgment debtor is likely to alienate the property to defraud the decree-holder?

2546.- C P C O XX rr 57 and 66-"Default" Meaning of attachment— Power of the Court to continue attachment after dismissing an application for execution—Court's error of Law, parties it must suffer for— Acquiescence.

Omission to issue or serve a notice under O XXI r 66 Civ Pro Code, upon the judgment debtor is a "default" within the meaning of O XXI r 57. There is no reason for giving a restricted meaning to the word "default" in O XXI r 57 and cofining it to default in appearance, in the payment of process-fees, or in the production of documents.

The words of O XXI r 57 being explicit and imperative, upon the dismissal of an application for execution for default, attachment ceases, even though the Court and the parties intended that the attachment should subsist.

Namuna Bibi v. Roshan Mea.
15 C W N 428=9 Ind Cas 558.

—O 21 r 57—Review—Private sale of property—Attachment, object of—**See** C P C (1908) O 21 r 58. Case No (2554.) **14 C L J 476.**

C P C (1908) O 21 r 57—Claim to attached property on behalf of idol, if triable in execution proceedings—**See** C P C (1908) S 47. Case No (156A). **18 M L J 21.**

C P C O 21 r 58=S 278 of 1882

1 Investigation of claims to and objections to attachment of attached property 2547—2557

1. Judgment-debtor not [illegible] necessary party 2547—2548
2. Auction purchaser-Right of purchaser to impeach validity of mortgage 2549
3. Prior mortgagee not entitled to intervene 2550
4. Landlord's interest in tenure sold after decree 2551
5. Attachment—Investigation of claim—Order—Appeal 2552—2553
6. Review-Private sale of property——Attachment, object of 2554
7. Attachment of property—Execution of mortgage decree 2555—2556
8. Attachment of property—Limitation. 2557

See Cases under:--

(1) Claim to attached property.
(2) Court Fees Act Sch II, Art 17, cl 1.
(3) Estoppel-Estoppel by Judgment.
(4) Limitation Act 1877. Art 11.
(5) Limitation Act. 1877, art 13.
(6) Onus of Proof—Claims to attached property.
(7) Bengal Tenancy Act S. 170
(8) C P C (1908) S. 47—Parties.
(9) Jurisdiction.
(10) C P C S. 47—Parties.
(11) C P C S. 47—Representatives.

1 INVESTIGATION OF CLAIMS TO & OBJECTIONS TO ATTACHMENT OF ATTACHED PROPERTY.

(1) Judment-debtor not a necessary party.

2547—C P C O 21 r 58=(1882)—Ss. 278, 283—Suit against successful claimant for declaration that certain property belongs to the judgment-debtor.

In a suit by the decree-holder against a successful claimant to establish that certain property belongs to his judgment-debtor and that he is entitled to bring it to sale in execution of his decree, the only person against whom he claims relief is the successful claimant. To such a suit the judgment-debtor is not a necessary party. **Chasi Ram v Mangal Chand.**
1905 A W N 172; 2 A L J 491; 28 All 41.

2548—C P C O 21 r 58=S. 278 of 1882.

It depends upon the facts of each case whether the judgment-creditor in proceedings under Sec 246 of the Act VIII of 1859 (and Semble Sec 278 of Act XIV of 1882) represented the judgment-debtor [illegible] to make him [illegible] party to the suit, of a party against whom the order was made.

Shivapa v Dod Nagaya. P J (1886) 214 =11 Bom 114.

(2) Auction purchaser-Right of purchaser to impeach validity of mortgage.

2549—C P C O 21 r 58—Execution sale—Auction purchaser—Purchase subject to a mortgage.

A purchaser at the Court sale of attached property believed to be incumberred under S. 287, C P C is not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent him from benefitting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee. **Ganesh v Purshottam.**
11 Bom L R 26=33 Bom 311.

(3) Prior mortgagee not entitled to intervene.

2550—C P C O r 58; S. 115=(1882 ss. 278, 622)—Attached in execution—Decree for sale on

C P C (1908 O 21 r 58=(1882, S.278.) *–Contd.*

(1) Investigation of claims to & objections to attachment of attached property—*Contd.*

a mortgage.—

Prior mortgage not entitled to intervene in execution proceedings. S. 278 does not apply to the case of a mortgage decree for sale, the attachment being made in that case not in execution proceedings, but by virtue of the decree. A prior mortgagee, if not impleaded in the suit, is not entitled to intervene in execution proceedings, and the order allowing his objection for sale is one passed without jurisdiction and is a proper subject for revision. **Hukam Singh v Raghubir Saram.** **1905 A W N 157=27 All 700.**

(4) Landlord's interest in tenure sold after decree.

2551—C P C O 21 r 58=S. 278 (1882)—Ss. 170, 65, 148-Decree for rent—Execution—Claim under S. 278, C P C—Admissibility—Decree, if it continues to be a first charge on tenure.

When the plaintiff in a suit for rent is shown to have been the landlord at the date of the suit and also at the date of the decree, both suit and decree would clearly be a suit and a decree under the Bengal Tenancy Act, as provided in S. 170 of the Bengal Tenancy Act. No claim can be preferred under S. 278, C P C when such a decree is put in execution. The fact that the plaintiff sold his interest in the tenure subsequently to obtaining the decree would not prevent him from obtaining the benefit of s 65 of the Act. (3 C W N 601 overruled.) **Khetrapal Singh Roy v Kritarthamoyi Dasi. 10 C W N 547 F B=33 Cal 566.**

(5) Attachment—Investigation of claim—Order—Appeal.

2552—C P C O 21 r 58 S.115=Civil Procedure Code (Act XIV of 1882), Secs. 278, 622.

No appeal lies from an order passed, under s. 278 of the Civ. Pro. Code, upon the application by a person not a party to the suit or by a party to a suit applying in a different character to raise the attachment. **Dayaram Jagjivan v Goverdhandas Dayaram.** **6 Bom L R 462=28 Bom 458.**

Notes:—Dist: 36 Cal 130. Ref: 11 Bom L R 754.

2553—C P C O 21 rr 58, 59=(1882 S. 278, 279)—Letters Patent, s. 15-Civil Procedure Code. Ss. 278, 282, 588, 591, 595 and 597—Claim on the original side, High Court-Appeal-Judgment-Interest of claimant.

C P C (1908) O 21 r 58=(1882, S.278) *–Contd.*

(1) Investigation of claims to & objections to attachment of attached property—*Contd.*

Sections 588 & 591 of the Code of Civil Procedure do not control the operation of s. 15 of the Letters Patent and an appeal will lie from an order amounting to a judgment of a single judge of the High Court to two or more judges of the same Court whether an appeal against such order is provided by s. 588, Civil Procedure Code, or not.

An order dismissing a claim petition under s. 282 of the Code of Civil Procedure on the merits is a judgment within the meaning of the word in s. 15 of the Letters Patent.

A person who has only a beneficial interst in property has sufficient interest to prefer a claim under section 278 of the Civil Procedure Code.

A person for whose benefit a mortgage has been taken in the name of a trustee or in the name of an agent, has a beneficial interest not only in the mortgage money but also in the mortgaged property, and he can, therefore prefer a claim under S. 288 Civil Procedure Code.

The Judgment of Shephard J. reversed.

Sabapathy Chetty v Narayanasami Chetty **11 M L J, 346=25 Mad 555.**

(6) Review—Private sale of property—Attachment, object of.

2554—C P C O 21, rr 58, 57—Execution proceedings-Effect of reversal-Application dismissed for default.

A revival of execution proceeding does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. The reversal of judicial orders leaves unaffected the rights of strangers, bona fide purchasers, whether under execution sale or under private sale, who have acquired title on the assumption that such orders were valid in the law. (11 C L J 254, 37 Cal 107, Ref.). The true object of attachment is to place the property in the custody of the Court so as to make it available for the realisation of the fruits of the decree. If, by reason of dismissal of the suit or of the default of the decree-holder, the Court dissolves

C P C (1908) 0 21 r 58=(1882,S.278) -*Concld.*

(1) Investigation of claims to & objections to attachment of attached property -*Contd.*

the attachment, the property ceases to be in the custody of the Court. Upon reversal of the decree or upon cancellation of the order of dismissal for default, the decree-holder may ask the Court to take the property back into its custody, but in the absence of statutory provision to the contrary, the Court cannot do so with retrospective effect, so as to prejudice a title that may have been acquired in the interval by a stranger, when the property was admittedly not in the custody of the Court. **Patringa Koer v Madhavanand Ram**

14 C L J 476

(7) Attachment of property—Execution of mortgage decree.

2555—C P C O 21, r 58 (=s. 278, Civ Pro Code, 1882)—Execution of money-decrees.

Although s. 278, Civ Pro Code, is not applicable in a case where property has been declared liable to sale under a mortgage, yet it has been rightly applied in the present case. (14 Cal 631 18 Bom 98, 17 Mad 17, Dist.) **Sawmy Vellau Pillay v O M M R M Muthiah Chetty**

L B R 1893—1900, 509.

2556—C P C O 21 rr 58, 63=(1882 Ss. 278, 283)—**Execution of decree—Attachment—Objection allowed—Suit by decree-holder decreed-Previous attachment whether subsisting—Lien of attaching creditor—Rights of purchaser during attachment.**

Held, that the lien of an attaching creditor over the property attached dated from the attachment and was not destoryed or affected by an order of release which was in effect set aside by a subsequent decree in a regular suit.

Semble:—A person, purchasing property at a time when it was subject to an attachment order of a Civil Court, could hold no better or higher position than his vendor. (21 W R 435; 23 Cal 829; 33 Cal 1158; 10 Bom 400; 17 A W N 124, Ref and Fol.) **Ali Ahmad Khan v Bansidhar**

6 A L J 434=31 All 367=
1 Ind Cas 951.

(8) Attachment of property—Limitation.

2557-C P C O 21 r 58—Civil Procedure Code (VIII of 1859) section 246—Intervenor—Execution sale.

C P C (1908) 0. 21 r. 58=(1882S.278) -*Contd.*

(1) Investigation of claims to & objections to attachment of attached property -*Concld.*

Where intervenors claimed a share of attached property under s. 246, Act VIII of 1859, the Court had to determine the respective shares of the debtor and the intervenors and sell the debtor's definite share only. If the Court omitted to do so and sold undefined rights and interests, there was no decision under section 246, and the intervenors were not bound to institute a regular suit within one year. (4 W R 35 followed.)

Udit Narain Singh v Murtoza Khan.

2 A L J 178=1905 A W N 49=
27 All 464.

—0 21, rr 58, 60, 61, 62, 63—Court Fees Act, 1870, s. 7, Cls (iV) and (c) and (viii), s. 12 (ii), art 17 cl (1) of sch. II.

U B R 1897-1901 Vol. II 355.

—0 21, rr 58, 63—Small Cause Court, Presidency Towns, Jurisdiction of:-**See**

26 Cal 778=4 C W N 590.

—0 21 r 58=(1882) S. 278 See Bengal Tenancy Act S. 170. Case No. (548)

23 Cal 382 F B.

—0 21 r 58 —Order for sale without attachment—Legality of proceedings—Attachment before jurisdiction. **See** **13 C L J 243.**

—0 21 rr 58, 61, 63- See also Limitation Act, 1908, Arts. 11 and 11-A.

—0 21 rr 58. 62— Declaratory suit for release of property from attachment—Jurisdiction Valuation—**See** **71 P L R 1906=**
55 P R 1906.

—0 21 r 58=S. 278 (1882) See Bengal Tenancy Act S. 170. Case No (549).

36 Cal 765=3 Ind Cas 306.

—0 21 r 58=S 278 (1882) See Bengal Tenancy Act S. 170. Case No (554)

10 C W N 547 F B.

C P C (1908) 0 21 r 58—Property attached-Legal representative-Plea that property attached is trust property—Appeal-Execution of decree. **See** C P C (1908) s 47. Case No 173. **3 A L J 370=A W N (1906) 157.**

C P C (1908) O. 21 r.58=(1882,S.278)

-Contd.

—O 21 r 58—Objection to execution by party who had been [illegible] defendant but had been exonerated from the proceedings in appeal. **See** O P C (1908) S. 47. Case No. (634).
A W N (1893) 67.

—O 21 r 58—Execution of decree-Party to suit—Proceedings under Ss. 278 and 283—Refusal of Court to consider plaint under s. 283 as application under s. 244. **See** C P C (1908) s. 47. Case No. 170. **A W N 1900. 196.**

—O 21 r 58—Auction prchaser. **See** C P C (1908) S 47. Case No. 283. **1906 A W N 62.**

—O 21 r 58—Judgment debtor in possession [illegible] trustee-Personal decree against judgment-debtor-Parties to suit. **See** C P C (1908) S. 47. Case No. (248). **14 C L J 425.**

—O 21 r 58—Exonerated defendants. **See** C P C (1908) S 47. Case No. 237. **6 C W N 10**

—O 21 r 58—Claim as by shebait-Decree for personal debt. **See** C P C (1908) s. 47. Case No. (516). **8 C W N 353.**

—O 21 r 58—Appeal—Claim-Debutter property—Right of suit. **See** C P C (1908) S. 47. Case No. (816). **11 C W N 145.**

—O 21 r 58—Decree against a person personally—Sale of property-Claim by as shebait. **See** C P C (1908) S. 47 Case No. (616).
12 C W N 308.

—O 21 r 58—Stay of execution pending suit between decree-holders and judgment debter. **See** C P C O 21 r 29. Case No. 2479. **31 Mad 125.**

—O 21 r 58—Judgment-debtor, objection by —Decree-holder—Small Cause Court suit-Second appeal—Revision-Separate suit. **See** C P C (1908 S. 47. Case No. (525-526). **10 M L J 85.**

—O 21 r 58—Official Assignee. **See** C P C (1908)—S. 47. Case No. 348. **10 M L J 116**

—O 21 r 58—Karnavan. **See** C P C (1908) S. 47. Case No. (358). **17 M L J 377.**

—O 21 r 58—Decree against the Karnavan -Execution of-Resistence by the members of the tavazi.—**See** C P C (1908) S 47. Case No. 236.
2 M L T 31.

C P C (1908) O 21 r 58=(1882,S. 278)

—Concld.

—O 21 r 58—Claim by legal representative of dependant for land sold in execution to be investigated under S. 47. **See** C P C (1908) S 47 Case No. (164). **2 Ind Cas 432.**

—O 21 r 58—Persons wrongly impleaded [illegible] defendants not estopped. **See** C P C (1908) S. 47. Case No. (812). **[illegible] Ind Cas 161.**

—O 21 r 58—Auction-purchaser.—**See** C P C (1908) S 47. Case No. 293. **9 Ind Cas 194.**

—O 21 r 58—Judgment-debtor, objection by—Decree-holder-Small Cause Court suit-Second appeal-Revision-Separate suit. **See** C P C (1908) S 47. Case No (524). **[illegible] O C 405.**

—O 21 r 58—Heir. **See** C P C (1908) S 47. Case No. 329. **73 P L R 1904.**

—O 21 r 58—Mode of execution—Decree for specific moveable property. **See** C P C O 21 r 31. Case No. 2482. **7 C P L R 105.**

—O 21 r 58—Mortgage is not immoveable but moveale property. **See** C P C (1908) O 21 r 46 (1). Case No (2514). **14 C P L R 124.**

—O 21 r 58—Bar—Erroneously proceeding under S. 278. s 283 is not bar for subsequent proceedings. **See** C P C (1908) S 47. Case No. 169. **17 C P L R 178.**

See also Cases under:—

(1) Claim to attached property.
(2) Bengal Tenancy Act S. 148 A. Case No. (444). **[illegible] Ind Cas 50.**

C P C (1908) O.21 r 59=S 279 (1882)

Evidence to be adduced by claimant.

2558—O 21 rr 59, 60, 61, 63, 79 (3)=(1882 S. 279, 280, 281, 283, 301, 355)—"Possession" and "Possesed"-Debt other than negotiable instrument —Attachment of-Claim by third party--Order on claim—Limitation Act, Sch. 11 Art 11. The term "possession" is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession and sometimes to constructive or legal possession. The word "possessed" in s. 279 and the word 'possession' in S. 280 and S. 281 are not restricted to merely tangible or physical possession but include constructive possession or posses

C P C (1908) O 21 r 59 = (1882, S.279) -*Contd.*

sion in law of debts and other intangible property. A debt may be attached under ss 266 and 268, and a claim may be preferred against the attachment and investigated under S. 278, and an order passed in such claim under s 283 C P C will be subject to the operation of s 283 C P C and Art. 11 of Sch. II of Act XV of 1877 (Limitation Act). (24 Mad 20 overruled). The word "possess" in s. 355 C P C., is applicable not only to tangible property but also to debts and other intangible property. **Chidambara Patter v Ramasami Patter.** **27 Mad 67 = 13 M L J 467; F B.**

See Cases under.

(1) Claim to attached property.
(2) Title
(3) Court Fees Act sch. II Art. 17 cl. (1)
(4) Estoppel – Estoppel by judgment.
(5) Limitation Act 1877 Arts 11, 13.
(6) Onus of proof – Claims to attached property.
(7) Bengal Tenancy Act s. 170.
(8) C P C (1908) S 47-Parties.
(9) Jurisdiction.

—O 21 r 59—Attachment—Investigation of claim-Order—Appeal. See C P C (1908) O 21 r 58, Case No (2558). **11 M L J 346.**

C P C (1908) O 21 r 60 = S.280 of 1882.

Release of property from attachment.

2559—C P C O 21 r 60 = (1882, Civ. Pro. Code, s. 280)– Attachment—Objection—Costs—Appeal.

A District Judge has no jurisdiction to entertain an appeal from an order made by a Subordinate Judge in connection with a proceeding held by him under s. 280 of the Code.
Ragunath Das v Badri Prasad.
A W N 1883, 178.

Delivery of moveable property, debts & shares

C P C (1908) O 21 r 60 = (1882, S 280) -*Contd.*

2559 A—C P C O. 21, r. 60—(Ss. 280, 279, 281, 283-301, 355)—"Possession" and "Possessed"—Debt other than negotiable instrument—Attachment of—Claim by third party—Order on claim—Limitation Act, Sch. II, Art. 11:

The term "possession" is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession. The word "possessed" in S. 279 and the word "possession" in Ss. 280 and 281 are not restricted to merely tangible or physical possession but include constructive possession or possession in law of debts and other intangible property. A debt may be attached under ss. 266 and 268, and a claim may be preferred against the attachment and investigated under S. 278, and an order passed in such claim under S. 283, C. P. C., will be subject to the operation of S. 283 C. P. C, and Art. 11 of Sch. II of Act XV of 1877 (Limitation Act). (24 Mad 20, overruled). The word "possess" in S. 355, C. P. C., is applicable not only to tangible property but also to debts and other intangible property. **Chidambara Patter v Ramasami Patter** **(1903) 13 M L J 467 = 27 Mad 67 F B.**

See cases under:—

(1) Claim to attached property.
(2) Title.
(3) Court Fees Act sch II art. 17 Cl. 1.
(4) Estoppel – Estoppel by judgment.
(5) Limitation Act 1877 arts 11, 13.
(6) Small Cause Court, mofussil—Jurisdiction—Claims to property seized in execution.
(7) Mitakshara.
(8) C P C S. 47—Parties.
(9) Onus of proof – Claims to attached property.
(10) Bengal Tenancy Act s. 170.

C P C O 21 r 60.-
See C P C S. 47 (244). Case No (237).
6 C W N 10.

C P C (1908) O 21 r 60=(1882, S.280) -Concld.

—O 21 r 60—Property—Attached-Legal representative—Plea that property attached is trust property—Appeal—Execution of decree.

See—C P C (1908) S. 47 Case No 172.

3 A L J 370=A W N (1906) 157.

—O 21 r 60—Mortgage decree—S. 244, Applicability of.

See—C P C (1908) S. 47. Case No (143).

8 C L J 20.

—O 21 r 60—Exonerated defendants.

See—C P C (1908) S. 47. Case No (237).

6 C W N 10.

—O 21 r 60—Attachment of debt, share etc.

See—C P C O 21 r 46 (1). Case No (2511)

27 Mad 67.

—O 21 r 60—Evidence to be adduced by claimant.

See—C P C (1908) O 21 r 59. Case No (2558).

27 Mad 67.

—O 21 r 60—Delivery of moveable property debts and shares.

See—C P C (1908) O 21 r 79 (3). Case No (2600). **13 M L J 467.**

—O 21 r 60—Claim to attached property by representative of deceased judgment-debtor:

See—C P C (1908) S. 47. Case No (765).

6 C P L R 4.

—O 21 r 60—Suit to establish right to property released from attachment—Objection by a person not a party to the suit.

See—C P C (1908) S. 47. Case No (632).

63 P R 1889.

C P C O 21 r 61=(1882) S 281 (1859 S. 246).

Disallowance of claim to property attached.

See cases under:—

(1) Claims to attached property.
(2) Limitation Act 1877 Arts. 11, 13.
(3) Title.
(4) Court Fees Act sch II art 17 cl 1.
(5) Estoppel—Estoppel by judgment.

C P C (1908) O 21 r 61=(1882, S. 281) - Concld.

(6) Onus of proof—Claims to attached property.
(7) Bengal Tenancy Act s. 170.
(8) C P C (1908) s. 47—Parties.
(9) Jurisdiction.
(10) Right of suit.

2560.—C P C O 21 r 61—Civil Procedure Code, Ss. 281, 202, 578—Extrinsic evidence of date-Irregularity.

When an order under S. 281 of the Code of Civil Procedure is not dated, extrinsic evidence of the date may be given, and S. 91 of the Evidence Act does not apply to the case. Having regard to Ss. 202 and 578 of the Code of Civil Procedure the omission to date the order cannot prevent its acquiring legal operation, but must be treated only as a mere error of form. **Suryanarayana v. Nilamani.** **1 M L J 478.**

—O 21 r 61—Attachment of debt, share etc. **See** C P C (1908) O 21 r 46 (1). Case No (2511)

27 Mad 67.

—O 21 r 61—Evidence to be adduced by claimant. **See** C P C (1908) O 21 r 59. Case No. (2558) **27 Mad 67.**

—O 21 r 61—Delivery of moveable property debts & shares. **See** C P C (1908) O 21 r 79 (3) Case No. (2600) **13 M L J 467.**

—O 21 r 61—Claim to attached property by representative of deceased judgment-debtor. **See** C P C (1908) s. 47. Case No (765)

6 C P L R 4.

C P C O 21 r 6 1882 s. 282

See Cases under:—

(1) Claims to attached property
(2) Limitation Act Arts 11, 13
(3) Title
(4) Court Fees Act sch II Art 17 cl 1
(5) Estoppel—Estoppel by judgment
(6) Onus of proof—Claims to attached property

C P C (1908) O 21 r 62=(1882 S. 282) *-Contd.*

(7) Bengal Tenancy Act.
(8) C P C (1908) s. 47—Parties
(9) Jurisdiction

Continuance of attachment subject to claim of incumbrance.

2561-C P C O 21 r 62 (1882)-s 282 Lien, declaration of, effect on purchaser—Estoppel-Waiver-Mortgage, validity of, raised in defence without bringing a suit under section 283—Fraud—Equitable claim.

A person who purchases a property in execution of his own decree, apparently subject to a mortgage lien as declared by the Court under sec 282 of the Code of Civil Procedure, without however acquiescing in the order made under sec 282 in favour of the mortgage is entitled to question the validity and *bona fides* of the mortgage, if done so, within a year of the order in the claim case, by way of defence in the suit brought against him by the mortgagee to enforce his mortgage lien, although he may not have instituted any suit under sec. 283 of the Civil Procedure Code to establish the right which he claims in the property in dispute.

There is no waiver or estoppel on the part of the purchaser, so far as the mortgagee is concerned, to raise the plea that the mortgage is invalid.

A party who has perpetrated a fraud cannot be allowed to take advantage of it. A fraudulent and collusive mortgage cannot be enforced even as against a purchaser with a declaration as above under Sec 282 of the Civil Procedure Code, if impeached within the period allowed by the law.

A fictitious mortgagee cannot set up and enforce any equitable claim for re-imbursement which the mortgagor may have as against the purchaser. (27 All 97 Ref.). **Shahzia Uddin Abdul Hossein v Kailash Chandra Shaha.**
2 C L J 599.

C P C 1908 O 21 r 62=S. 282 (1882).

See Cases under Court Fees Act, 1820 sch II, art 17.

—O 21 r 62— Decree-Execution order under s. 244 C P C for transfer of execution-Confirmation of order in appeal—Application by decree-holder **See** C P C (1908) s. 47. Case No (819)
A W N 1885, 270.

C P C (1908) O 21 r 62=(1882,S.282) *-Concld.*

C P C (1908) O 21 r 62—Claim to attached property on behalf of idol if triable in execution proceedings. See C P C (1908) S. 47, Case No 156 A.
18 M L J 21.

III C C 46.

C P C O 21 r 63=S 283 (1882)

Saving of suits to establish right to attached property

Notes.—This rule corresponds to section 283, C P Code, 1882, with some modifications.

The words *"where a claim or an objection is preferred"* have been substituted for the words "the party against whom an order under section 280, 281 or 282 is passed" which occurred in the old section. No other change has been made.

C P C O. 21, r. 63=(1882, S. 283).

1 **Suit for recovery of price-Jurisdiction 2561A.**
1A **Proof, nature of required—In a suit under S. 283 2562-2564.**
2 **Specific Relief Act S. 42, inapplicability of, to such suit. 2565—2566.**
3 **Declaratory suit and injunction —Value of suit 2567.**
4 **Right of suit-Not personal merely 2569.**
5 **Suit against insolvent judgment-debtor 2570.**
6 **Suit under. finding sale, to purchasers of mortgagee's right. 2570A.**
7 **Intervener 2570B**
8 **Application under—Limitation Act 1877, Art. 11.**

See Cases under:—

(1) Claims to Attached Property.
(2) Estoppel—Estoppel by Judgment.
(3) Limitation Act, 1877, art 11.
(4) Onus of Proof—Claim to attached property.
(5) Small Cause Court, Mofussil —Jurisdiction—Claims to property seized in Execution.
(6) Contract Act (IX of 1872)
(7) Court Fees Act (IX of 1872)
(8) Limitation Act XV of 1877 Sch II Art II
(9) Lispendens
(10) C P C S. 47-Parties
(11) Valuation of suit
(12) Right of suit—Execution of decree.

C P C (1908) O 21 r 63=(1882, S.283

-Contd.

(1) Suit for recovery of price-Jurisdiction.

2561.A —C P C O 21 r 63—Wrongful attachment of crops—Objection to attachment disallowed without adjudication—Suit for recovery of price—Jurisdiction. **8 A L J 187.**

(1A) Proof, nature of required-In a suit under s. 283

2562.—C P C O 21, r 63=(S. 283)—C P C.—To establish his right to attach and sell the property in execution of his money-decree, he need only prove that on the date of the attachment his judgment-debtor had a subsisting right to the property. **Vasudeo v Eknath. (1910) 12 Bom L R 957.**

2563.—C P C O 21 r-63=(1882 S. 283)-Suit under—Burden of proof:—When an objection preferred under S. 278 of the Code of C P is disallowed and the objector insitutes a suit, he is bound to lay some evidence to satisfy the Court that the document under which he claims represents a *bona fide* and genuine transaction and the burden does not lie upon the defendant in the first instance to give evidence in proof of the fraudulent and collusive nature of such document. (A W N (1887) p 71; A W N (1899) p 223; 18 All 369; 12 Bom 270; 8 All 178 Ref:)

Nannhi Jan v Bhuri 5 A L J 358= 30 All 321=1908 W N 125.

C C C O 21 r 63=S.283-Title suit after defeat of claim-Burden of proof. **13 Ind Cas 455.**

2564.—C P C O 21 r 63—Ss 36, 40—Civ. Pro. Code Ss 283 and 284—Misjoinder=Landlord taking special procedure under Act for realization of rent—Onus on landlord to show requirements of Act have been complied with—Arrears of—Attachment by landlord of defaulter's interest in loan - Sale, notice of—Interval of time between date of issue of notice and sale—Irregularity—Sale vitiated—Sale after 7 days from date of public notice immaterial—Parties in a suit to set aside sale:—

C P C (1903) O 21 r 63=(1882, S.283)

-Contd.

It is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with (9 Cal 609, 3 Mad 114, 12 Cal 67 and 19 Cal 699, followed.) [See also 30 Cal 1 at p 12, 26 Mad 260—Ed.] Ss. 36 and 40 of the Rent Recovery Act should not be read together so as to import into s. 40 the effect of S. 36 as regards sales of moveable property *prima facie*, non-compliance with the requirements of the Act will vitiate a sale. An exception is introduced to this general rule by S. 36 which is expressly limited to the case of moveable property. The reason for the exception is that damage sustained by irregularity in the sale of moveable property can in all cases be met by pecuniary compensation An irregularity in the sale under S 40 of the defaulter's interest in the land will vitiate the sale. (3 Mad 112; followed.) S. 18 does not require that notice should be published 7 days before date of sale, but that in fixing the date of sale not less than 7 days must be allowed from the time of public notice. Where a sale is notified to take place for a number of days, the first day is none the less "a day fixed for sale" within the meaning of S 18, although as events may turn out no sale may in fact take place on that day. Though a sale of every item of the property sold is a separate sale and different persons may have purchased at such sales, a suit by the tenant to set aside the sales against the different purchasers is a suit in respect of the "same matter" and is not bad for misjoinder where the ground of relief is the alleged wrongful sale of the tenant's lands in respect of the same arrears and the proceeding in respect of which the various items are sold is, one. In a suit under S 283 C P C the cause of action is not the order under S. 283 but the alleged wrongful attachment is the cause of action, and the different purchasers of the attached property joined as defendants in the same suit. **Dorasamy Pillai v Muthusamy Moopan. (1903) 13 M L J 479=27 Mad 94.**

(2) Specific Relief Act S. 42, inapplicability of, to such suit.

2565.—C P C O 21 r 63=(1882 S. 283)-Prayer for further relief not necessary.

C P C (1908) O 21 r 63=(1882,S.283) *-Contd.*

When second defendant attached certain immoveables in execution of a decree for money, which she had obtained against first defendant, plaintiff presented a claim based on a mortgage alleged to have been made to him by defendant. The claim having been rejected, plaintiff sued under S. 283, for a declaration of his right as mortgagee to the attached property and for the cancellation of the order of rejection of his claim. On reference to the Full Bench of the question, whether the suit was substainable with reference to S, 42 of the Specific Relief Act, *held*, doubting the correctness of the decision in Kunhiamma v Kunhunni, and following the law on the question as correctly laid down by Muttusami Iyer, J, in his judgment in Ambu v Kettilanuna, that the proviso to the said S. 42 of the Specific Relief Act does not operate so as to take away from a party, against whom an order has been made under Ss. 280, 281 or 282 of the Code the special right conferred by S 283 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach and such a suit is therefore not liable to dismissal on account of the omission to pray for further relief obtainable. (16 Mad 140 *doubted*; 14 Mad 23 at p 25 Fol).

Kristnam Sooraya v Pathma Bee.
29 Mad 151.

2566—C P C O 21 r 63(=S. 283 Civ Pro Code **1882)—Suit for a declaratory decree—Right to establish title of judgment-debtor to property attached—Specific** Relief Act s. 42.

S. 283 Civ Pro Code gives a special permission to sue for the right claimed, and that is the title of the judgment-debtor to the property, following which is the right of the plaintiff to attach that property. The plaintiff here did not seek for possession of the property, and attachment would be made if the plaintiff desired it, under his original decree. Thus even assuming that the second paragraph of s. 42 Specific Relief Act applies to a suit of the nature specially provided for under s. 283 it is clear that the plaintiff in this case has a right to sue for a mere declaratory decree. **C. S. R. M. Sabapadi Chetty v Maung In.** **L B R 1893—1900 481.**

C P C O 21 r 63=S. 283—Suit under—S. 42, proviso, Specific Relief Act—provisions of—Applicability.—**See** **10 P R 1912 (Civil).**

C P C (1908) O 21 r 63=(1882,S.283) *—Contd.*

C P C O 21 r 63.—See Specific Relief Act 1877 s. 42. **4 L B R 88.**

—O 21 r 63.—Declaratory suit by objector against decree-holder under valuation of—For purposes of jursdiction. See. **5 L B R 23=**
2 Ind Cas 621.

—O 21 r 63—Suit under, for declaration of attaching creditor's right to bring property to sale—**See** Valuation of Suits,
2 A L J 115=A W N 1905, 37=27 All 440.

(3) Declaratory suit and injunction—Value of Suit

2567.—C P C O 21 r 63=(1882 S. 283)—Suit under it -Stamp on the plaint Court Fees Act (VII of 1870), Sch II Art 17 clause **(i).**

Where a suit is brought under Sec. 283 of the C P C the proper Court fee payable on the plaint is Rs. 10 under clause (i) of Art 17 of Schedule II of the Court Fees Act.

When a suit asks for a declaration and for an injunction, it is not one merely for declaratory decree but also for consequential relief.

When a plaintiff seeks to challenge a decree in execution of which his property has been attached, the value of the action is the value to the plaintiff so that if the execution debt exceeds the value of the property, the latter is the value of the suit if the execution debt is less than the value of the property, the former is the value of the suit.

In suits to set aside summary decisions as also in those dealing with arbitration awards, the amount of Court Fees payable on the plaint does not depend upon the value of the suit.

Bibi Phul Kumari v Ghansyam Misra.
7 C L J 36=12 C W N 169=32 Cal 202=
5 A L J 10=35 I A 22 P C.

C P C O 21 rr 63, 62=(Ss. 283, 282)—Purchase subject to a declaration of mortgage lien under S. 282 -Subsequent attack on mortgage in suit by mortgagee within a year—No estoppel. **See** **2 C L J 599.**

(4) Right of Suit--Not personal merely.

2569—C P C O 21 r 63=(1882 s. 283).

The right of suit conferred by s. 283 C P C is not a personal right confined to the claimant alone but extends also to his representatives in interest. **Ganesh Pershad v Kashi Nath Tiwari.** **26 All 89.**

C P C O 21 r 63—Suit under, finding sale to purchasers of mortgagees right in certain land inoperative—Purchasers whether entitled to recover money paid for decree against mortgagee to save property from sale

A W N 1908, 58=5 A L J 163=30 All 167.

(5) Suit against insolvent judgment debtor.

2570.—C P C O 21 r 63=(1882) S. 283—Without impleading the Official Assignee—Decree.

Where an execution-creditor attaches the property of an insolvent judgment-debtor and a claim is allowed under S. 283 the attaching creditor has [illegible] right to institute a suit under S. 283 without impleading the Official Assignee. But the decree-holder however after the judgment-debtor's insolvency is not entitled to a decree declaring the property liable to be attached but is entitled to [illegible] decree declaring that the property is that of the judgment-debtor. (3 Bom 438 dist; 17 M L J 618 ref to.)

Annapurni Ammal v. Subramanian Chettiar **31 Mad 347.**

(7) Intervenor.

2570B C P C O 21 r 63=(S. 283)—Sale without decision on intervenor's rights—Suit to set aside sale—**See** Limitation

1905 A W N 49=27 All 464=2 A L J 178.

(8) Application under Limitation Act 1877 Art 11.

2571.—C P C O 21 r 63=(1882, S. 283-Application under—Dismissal for default—Limitation Act 1877 Art 11. Schedule II-If applicable.

Held that an order dismissing an application under sec. 278 of the Civil Procedure Code for default is an order passed without investigation; and Art 11 of the Limitation Act is not applicable to the case. (1 C W N 24; 11 C W N 487 App and follo 29 Mad 225 Referred to.)

Saraba Subba Ran v Kanisala Thimanayya.
3 M L T 106=31 Mad 5=17 M L J 554.

—O 21 r 63=(1882) S. 283—See Bengal Civil Courts Act 1871. Case No (9).

4 W N 114.

See also Cases, under:—
Valuation of suit.

—O 21 r 63=(1882) S. 283 See Relinquishment or omission to sue for portion of claim.

29 P [illegible] 1891.

C P C O 21 r 63=(1882) S. 283—**See** Multifariousness. **43 P R 1897.**

—O 21 r 63—Property attached—Legal representative—Plea that property attached is trust property—Appeal—Execution of decree—**See** C P C (1908) S 47. Case No 172.

3 A L J 370=A W N (1906) 157.

—O 21 r 63—Attachment of property—Execution of mortgage decree—**See** C P C (1908) O 21 r 58. Case No (2556). **6 A L J 434.**

—O 21 r 63—Private purchaser—**See** C P C (1908) S. 47. Case No 307. **7 A L J 26.**

—O 21 r 63—Objection to execution by party who had been a defendant but had been executed from the proceedings in appeal. **See** C P C (1908) S. 47. Case No (634). **A W N (1893) 67.**

—O 21 r 63—Execution of decree-Party to suit proceedings under Ss. 278 & 283—Refusal of Court to consider plaint under s. 283 as application under s. 244—**See** C P C (1908) S. 47. Case No 170 **A W N 1900 196.**

—O 21 r 63—Investigation of claims to & objections to attachment of attached property. **See** C P C (1903) O 21 r 58. Case No (2547)

1905 A W N 172.

—O 21 r 63—Appeal-Claim—Debutter property—Right of Suit—**See** C P C (1908) S. 47 Case No (816). **11 C W N 145.**

—O 21 r 63—Attachment property share etc **See** C P C (1908) O 21 r 46 (1). Case No (2511)

27 Mad 67.

—O 21 r 63—Delivery of moveable property debts & shares **See** C P C (1908) O 21 r 79 (3) Case No (2600) **27 Mad 67.**

—O 21 r 63—Evidence to be adduced by claimant. **See** C P C (1908) O 21 r 59. Case No (2558) **27 Mad 67.**

—O 21 r 63—See C P C (1908) O 21 r 16. Case No (2449) **5 M L T 278.**

—O 21 r 63—Claim to attached property by representative of deceased judgment-debtor. **See** C P C (1908) S 47 Case No (765).

6 C P L R 4.

—O 21 r 63—Judgment-debtor, objection by—Decree-holder—Small Cause Court suit-Second appeal—Revision-Separate suit. **See** C P C (1908) S. 47 Case No (624) **8 O C 405.**

—O 21 r 63—Heir-**See** C P C (1908) S. 47. Case No (329) **78 P L R 1904.**

—O 21 r 63 - Suit to establish right to property released from attachment Objection by a

C P C (1908) O 21 r 63=(1882,S 283) *—Concld.*

person not a party to the suit. See C P C (1908) S. 47. Case No (633) **63 P R 1889.**

C P C O 21 r 64=S. 284 of 1882.

Powers to order property attached to be sold and proceeds to be paid to person entitled.

Notes—This rule corresponds to section 284, C P Code, 1882, with some modifications. The words "*executing the decree*" after the words "any Court;" and the words "*by it and liable to sale*" after the word "attached" have been added.

—O 21 r 64—Execution of compromise decree—See. **6 C L J 95=11 C W N 879= 34 Cal 886.**

—O 21 r 64 See Appeal—Sale in execution of decree case No (1090—1091) **14 W N 16.**

—O 21 r 64 Ss. 284-285—See Sale in execution of Decree.

C P C O 21 r 65=S 286 of 1882.

Sale by whom conducted & how made.

Notes—This rule corresponds to section 286, C P Code, 1883, with some alterations and additions.

The words "*save as otherwise prescribed every sale*" have been added in the beginning; the words "*or by such other*" have been substituted for the words "any other;" the words "*in this behalf*" have been added after the word "appoint;" the words "except as provided in s. 296" which occurred in the old section, have been omitted; and the word "*prescribed*" has been substituted for the words "herein after mentioned". The above alterations have not made any radical change in the meaning.

Rule 76, (S. 296, C P Code 1882) of his order prescribes that negotiable instrument may be sold through a broker instead of by public auction.

2572—C P C O 21 rr 65, 76=(1882) ss. 286 and 296 (1859 s. 248)—Construction of.

In s. 248, Act VIII of 1859, the words "whom the Court may appoint" apply not only to the words "any other person," but also the officers of the Court. In the absence of the Subordinate Judge it is not competent to the Judge, because he is a superior officer, to perform the duties required by s. 248. **Judoonath Roy v Ram Buksh Chatterjee. 12 W [illegible] 288**

C P C (1908) O 21 r 66=(S.287 of 1882)

Proclamation of sales by Public auction.

Notes—This rule corresponds to section 287, C P Code, with several additions and alterations.

In sub-rule (2) the words "*shall be drawn up after notice to the decree holder and the judgment-debtor*" have been added. The addition is no doubt an improvement; but it will cause some delay in bringing the property to sale, and some additional expenses such as process-fee, &c.

Clauses (*a*), (*b*), (*c*), (*d*) and (*e*) are similar to the corresponding clauses of the old section.

Sub-rule (3) reproduces para 2 of section 287 of the old Code with much elaboration embodying in it the law as laid down in the case of 5 C W N 497, p. 502, noted below. The verified petition, which under the old Code, was required to be filed at the time of attachment is under the present Code to be filed after attachment and before issue of sale proclamation.

Sub-rule (4) corresponds to para. 2 of s. 287 of the old Code, with the addition of the words "*in the proclamation*" after the words " to be specified."

Para. 3 of section 287 of the old Code which empowered the High Courts to make rules under the old section, has been omitted; and the reason for the omission is that by sections 120 to 141 of the present Code, the High Courts have been empowered to make rules consistent with the provisions of this Code.

The last para. of s. 287 has also been omitted and reproduced as a separate rule (rule 70).

2573—O 21 rr 66, 70=S. 287—Proclamation under.

The object of the proclamation under s. 249 is to give notice to intending purchasers, not to the judgment-debtors. **Laek Ram v Mohesh Dass. 12 W R 488.**

Notes,—Ref: 18 W R 411.

2574—C P C O 21 rr 66, 70; s. 47=(1882 ss. 287, 244)—Appeal—Proceedings under s. 287—Ministerial not judicial—No order—Proceedings of a Court under s. 287, C P C., and the rules framed thereunder in relation to the proclamation to sale are not 'orders' and are therefore not applicable as "decrees". **Sivagami Achi v Subramania Aiyar. 14 M L J 57= 27 Mad 259 F B.**

Notes—Ref: 18 M L J 568.

2575—C P C O 21. rr 66 (3) 70 (=s. 287, Civ Pro Code, 1882)—Notification of sale—Contents—Adjournment of sale—Necessity of fresh notification—Judgment-debtor's consent.

Under s. 287, Civ Pro Code, the notification of sale should contain a detailed statement of the property to be sold, and where the property consists of several shares in different *patties*, it is not proper to lump the shares together. The notification should specify the number of shares to be sold in each *patti* and the revenue on such shares. When a Judge finds sufficient reasons for the postponement of a sale, he ought not to make it a condition that no further notification of sale should take place. The notification may be a matter of vital importance to the judgment-debtor and may be a matter of very great importance to the creditor, because having no notification might limit the number of possible purchasers, and might affect even those persons who came to the sale, as they would have no proper *data* from which to estimate the value of the property and make their bids. When a sale is fixed to take place on one day, it cannot be properly held on another day, without the issue of fresh proclamation, unless the judgment-debtor consents to such sale. **Ganesh Singh v Banno Bibi. A W N 1887, 50**

2576—C P C O 21 rr 66,70=(1882 S. 287, cl.(c))—Execution sale—Sale-proclamation—Statement of value—Inquiry as to approximate value when to be made. It cannot be laid down generally that in no case should any inquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale-proclamation.

Where the decree-holder stated the value of the property to be Rs. 15,000 but the judgment-debtor objected that the value was Rs. 1,50,000 and the Court adopted the former valuation without any inquiry, *held* that in the face of the discrepancy in the value as stated by the decree-holder on the one hand and the judgment-debtor on the other, an inquiry as to the approximate value of the property was obviously necessary and should be held. (31 Cal 922. *commented on.*) **Saurendra Mohan Tagore v. Hurruk Chand • 12 C W N 542.**

2577—C P C O 21 rr 66, 70=(1882 s 287)—Sale proclamation, statement in, of value—Appeal—Application for execution of decree of appellate Court, whether an application in continuance of

application to execute the decree of lower Court—Time to take objections.

A judgment-debtor has the right to have as nearly as may reasonably be, a just and true valuation placed upon his property before it is sold: he has also the right to have the property to be sold described in the sale proclamation with reasonable accuracy, (25 I A 146; 15 I A 171 relied upon). An appeal lies against an order refusing an application made by a judgment-debtor objecting that the valuation of the properties contained in the sale proclamation was incorrect and in many instances grossly inadequate and that the properties were misdescribed in such a manner as to render their identification by intending purchasers extremely difficult: (9 Cal 214 declared absolute 9 All 500 distinguished 18 Cal 469 dist 23 Mad, 568 approved; 4 Cal 739 ref to.). Where the sale proclamation was published on 14th November and the judgment-debtors made an application on the following day for transfer of the execution proceedings to another district, pending the hearing of an appeal the decree holder took out execution of a mortgage decree. The judgment debtor made an objection to the validity of the sale proclamation on the ground that the statement therein as to the value of the property was incorrect: and the court overruled the objection the appellate Court altered the decree and extended the period of redemption; the decree-holder then made an application to execute the decree of the appellate Court. *Held*, that the application to execute the decree of the appellate court was not a continuation of the former application and the lower court was in error in declining to enter into the question as to the value of the property as stated in the sale proclamation. **Rajah Ramessur Prashad Narain Singh v. Rai Sham Krissen. 8 C W N 257.**

2578—C P C O 21 rr 66, 70=(1882 S. 287)—Sale proclamation, statement of value of property in—Investigation.—

The law does not require the court executing a decree to enter in the sale proclamation the value of the property to be sold, but only that it shall enter " any other thing which it considers material for the purchaser to know in order to judge of the nature and value of the property." So where a judgment-debtor objected to the statement in the sale proclamation as regards the estimated annual income of the property and its estimated value and urged that

C P C (1908) O 21 r 66=(1882, S. 287) -*Contd.*

the same was higher than what was stated therein, *Held*, that there was no law requiring the court to make [illegible] investigation by recording evidence and come to a decision. **Rai Kashi Pershad Singh v Babu Duleep Narain. 8 C W N 264.**

Kashi Pershad Singh v. Jamunu Pershad. Sahu. 31 Cal 922

Notes—Ref: 12 C W N 542.

2579—C P C O 21 rr 66, 70=(1882 s. 287)—**Property** ordered to be sold—Occupancy holding of Judgment-debtor—

Per Burkitt J-If the Court executing a decree is of opinion that the property which is ordered to be sold was the occupancy holding of the judgment-debtor it should enter that fact in clause (c) of the proclamation of sale issued under the provisions of s. 287, C P Code as a warning to intending purchasers. If that, which is sold is an occupancy holding, the purchaser of it acquires, by his purchase, no interest in that holding; the purchase is not binding on the land holder, and the occupancy tenant, whose interest has been sold, cannot by reason of s 56 of the Rent Act be ejected otherwis than in accordance with the provisions of the Local Tenancy Act No 11 of 1901. **Basdeo Prasad v Juthan Ram. 2 A L J 401=1902 A W N 138=27 All 684.**

2580.—C P C O 21 r 66.=(S 287)—Upset **price**—Necessity for mentioning.—

"It does not appear necessary that an upset price should be fixed in a sale proclamation." **Phulchand Ram v Narsingh Pershad Misser (1899) 28 Cal 73 at 77.**

C P C O 21 rr. 66= (1882) S. 287 (1859) S. 249).

See also Cases under:—

(1) Sale in Execution of Decree—Setting aside Sale—Irregularity.

(2) Appeal—Execution of Decree-Questions in execution.

(3) Mortgage—Sale of Mortgaged property—Rights of mortgagee.

(4) Sale in Execution of Decree—Immoveable property.

(5) Special or second appeal. **11 Ind Cas 759.**

(6) Relinquishment or omission to sue for portion of claim. **76 P R 1890.**

C P C (1908) O 21 r 66=(1882 S. 287) -*Concld.*

2580A—C P C (1908) O 21, rr. 66, 67, 68, 70 =(1882) Ss. 287, 289 & 290=(1859, S. 249)—Part of an estate.—

The "Part of an estate" in S. 249, Act VIII of 1859, meant the aliquot part of an estate. **Kelly Prosonno Bose v. Dinonath Mullick, 11 B L R 56=19 W R 434.**

C P C O 21, r 66—Finality of decision of executing Court as to property being non-ancestral.—**See** C P C (1908) S. 47. Case No. (798). **28 All 273.**

—O 21, r 66—Determination of attachment. **—See** C P C (1908) O 21, r 57. Case No.(2546). **15 C W N 428.**

—O 21, r 66—See C P C O 21 r 13. Case No. 2355. **P J 1897, p. 81.**

—O 21, r 66—Execution of decree—Incumbrances by third parties S. 287 applies & not S. 244—Therefore no appeal.—**See C P C** (1908) S. 47. Case No. (550). **1894 P J 48.**

—O 21, r 66—Application for amendment of sale proclamation—Appeal.—**See** C P C (1908) S 47. Case No. (512). **6 Ind Cas 180.**

C P C O. 21, r. 67=S. 289,of 1882

Notes: Sub rule (1) corresponds to first para. of S. 289, C P Code of 1882, with some alterations and additions. The words "*and published as nearly as may be*" have been added after the words "shall be made"

Sub-rule (2) corresponds to para. 2 of S. 289 of the old Code, with some modification. The word "*or*" has been substituted for the word "*and*" which occurred in the old Code after the words "official gazette"; and the words "*or in both*" have been added after the words "some local newspaper". The effect of the change is that under the present Code it is discretionary with the Court to direct the publication of the sale proclamation either in the official Gazette, or in [illegible] local newspaper or in both. Whereas under the old Code if the Court directed the publication in the official Gazette, it was also bound to direct its publication at the same time, in some local newspaper.

Sub-rule 3 is new. It has been framed to meet the conflicting decisions reported in 11 Cal 74; 18 Bom 368 and 12 C W N 757. In the case reported in 12 C W N 757 all the cases [illegible] the point have been referred to and discussed.

C P C (1908) O 21 r 68=(1882 S.290)

Notes:—This rule corresponds to section 290, C P Code, 1882, with some verbal changes only. The proviso to rule 43 refers to property which is subject to speedy and natural decay and it also refers to cases where the expense of keeping the properties in custody is likely to exceed its value.

See cases under:—

(1) Sale in Execution of Decree—Bidders.
(2) Sale in Execution of Decree—Setting aside sale – Irregularity.
(3) Appeal execution of decree—Questions in execution.
(4) Mortgage Sale of mortgaged property —Rights of mortgagee.
(5) Sale in execution of decree — Immoveable property.
(6) Special or second appeal.
(7) Relinquishment or omission to sue for portion of claim.

2581—C P C O 21, r. 68=(1882 S. 290)—Time of sale—Omission to comply with execution sale—Application to set aside—Lim. Act, Art. 166.

Where omission to comply with the provisions of S. 290, C P C cannot nullify a sale, limitation for an application to set it aside runs from the date of sale. (21 Cal 70, s c. 20 I A 165; 21 Cal 66, s c. 20 I A 176, ref. to.) **Kokil Singh v. Edal Singh,** **31 Cal 385.**

Notes:—Ref: 11 C W N 1011 F B.

C P C O 21, r 68—Attachment of a decree by a notice from another Court. — **See** C P C (1908) O 21, r 53. Case No. (2538). **3 C L J 27.**

C P C O 21, r 69=S 291, of 1882

Adjournment or postponement of sale.

Notes:—This rule corresponds to section 291, C P Code, 1882, with some modifications. The words "*under this chapter*" which occurred in the old section after the words " adjourn any sale " have been omitted. By the above omission this rule has been clearly made applicable to sales of mortgaged properties. Again the words " *thereupon the defendant's right to redeem and the security both be extinguished* ", which occurred at the end of S. 89 of the T. P. Act, IV of 1882, have been omitted from rule 5 of order XXXIV, (which corresponds to S. 89) in order to make this rule applicable to all sales of immoveable property. In this connection reference may be made to the Full Bench case reported in 31 Cal 863; 8 C W N 684, which clearly explains the object of the omission. The words " other than a sale by the Collector", which occurred in the old section have also been omitted on account of rule 70 which covers the exception.

2582—C P C O 21, r 69=(1882, S. 291)—T P A, S. 89 — Jurisdiction of Court to adjourn sale of mortgaged property — Order absolute, effect of.

S. 291, C P C is not necessarily and in all cases inconsistent with the provisions of S. 89 T. P A, and certainly not with that portion of S. 89 which provides that the sale shall be stopped if, before the lot is knocked down, the debt and costs are tendered to the proper officer of the Court. The Court has power to adjourn sales for proper reasons, *i. e.*, in order to have a better sale, in the event of want of bidders, or for any other similar reason, but not with a view to give time to the mortgagor to raise money to pay off the decree. The order absolute under S. 89, T P A., does not extinguish the ownership of the judgment-debtor in the property until the sale actually takes place. (25 Cal 703, dist: 21 Bom 300 diss from.) **Shyam Kishen v. Sundar Koer,** **31 Cal 373.**

2583—C P C O 21 r 69=(1882—S. 291)—Power to adjourn sale—T. P. A., S. 89—Execution of decree—Payment into Court of decretal money and costs—Stay of sale.

Where the sale of mortgaged property has been directed by an order absolute under S 89, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale the amount of the decretal debt and costs, and thereupon the execution proceedings will cease. It is not necessary that the person holding the equity of redemption should wait until the property is actually put up for sale. (19 All 209 and 20 All 354 foll: 31 Cal 863 ref. to.) **Mishri Lal v Mithu Lal,** **1905 A W N 168=28 All 28.**

2584—C P C O 21, rr 69, 90=(1882, Ss. 291, 311)—Sale adjournment of—Specification of hour—Irregularity in publishing and conducting sale—Inadequacy of price.

C P C (1908) O 21 r 69=(1882, S.291) -Contd.

When a sale is adjourned it is the duty of the court to specify the date and hour of sale, notwithstanding that the adjournment is due to the application of the judgment-debtor. In the present case the proclamation as originally published gave the 19th May as the date of sale and 12 A M as the hour. The sale was adjourned to the 26th May and no hour of sale was fixed, a further adjournment was obtained by the judgment-debtors on payment of Rs. 1000 and the sale was fixed for 21st July, again an adjournment was taken by the judgment-debtor the sale was fixed for the 24th November when the property was sold. The judgment-debtors waived fresh sale proclamations on all these dates and did not ask the Court to fix an hour. All these dates, *i. e*, the 21st July, 22nd September and 24th November are days of sale in the District and 12 A. M. is the usual hour for sales to commence. The judgment-debtors complained of the non-specification of the hour in the order of the 19th May adjourning the sale to the 26th of May.

Held, that the sale not having taken place on the 26th May there was no reasonable ground for holding that the irregularity in the order of the 22nd September resulted in substantial injury to the judgment-debtor.

The law regarding irregularity in the publication of sale and inadequacy of price consequent thereto discussed. **Mahabir Pershad Singh v Dhanukdhan Singh [illegible] C W N 686=31 Cal 815.**

Notes:—Ref: **6** C L J 11. Appr: 34 Cal 709 P C.

2585—C P C O 21 r 69=(1882 S. 291)—Stay of proceedings—**Fresh** proclamation necessary after each stay.

Under S. 291 of the Code of Civil Procedure when the stay of proceeding is removed, a fresh proclamation ought to be issued in compliance with terms of that section. When such a proclamation has not been issued, the judgment-debtor's remedy is to object to the confirmation of the sale and to impeach the sale by regular suit. **Gujrajmati v Saiyid. 9 Bom L R 83 =17 M L J 112=11 C W N 393= 29 All 196=5 C L J 138= 34 I A 37 P C=2 M L T 47.**

C P C (1908) O 21 r.69=(1882, S.291) -Contd.

—O 21 r 69—(1882) S. 291—See Cases under—Sale in execution of decree—Setting aside sale—Irregularity.

See also **Mortgage—Evidence**

2586—C P C O 21 r 69=S. 391—**Auction-purchaser** before confirmation of sale if may deposit under.

A first mortgagee obtained a decree on his mortgage in the presence of the second mortgagee. When he proceeded to sell the mortgaged properties, an auction-purchaser of the properties at a sale held in execution of a decree obtained on the second mortgage—which sale, however, had not yet been confirmed by Court—deposited the decretal amount under sec. 291, C P C and prayed that the sale might be stopped. *Held*—That the auction-purchaser was a representative of the judgment-debtor, second mortgagee, within the meaning of sec. 244, C P C, and he was entitled to make the deposit. (24 Cal 62 (1896), followed. [illegible] C W N 317: s c 27 Cal 966 (1899), referred to.) **Radha Kishun Marwari v Hem Chandra Bose. 11 C W N 495.**

—O 21 r 69—Sale in execution of decree-Tender of debt by transfer of property. **See** C P C (1908) S. 47. Case No (595). **10 All 1.**

—O 21 r 69—Order for stay of sale of property in execution of mortgage decree-Appeal. **See** C P C (1908) S. 47. Case No (378). **31 Cal 373.**

—O 21 r 69—Sale brought about by fraud in execution. **See** C P C (1908) S. 47. Case No (448) **11 C W N 848.**

C P C O 21 r 70=1882 S. 287.

Notes—This rule corresponds to the last para of s. 287, C P Code, 1882, with a slight modification, and it covers the exception contained in s. 291 of the old Code. *Transfer of decrees to Collector for execution.—See sections 68 to 72 and third schedule and the notes thereunder.*

See Cases under:--

(1) Sale in execution of decree—Setting aside sale—Irregularity.

C P C (1908) O 21 r 70=(1882, S.287) -Concld.

(2) Appeal—Execution of decree—Question in execution.
(3) Mortgage—Sale of mortgaged property—Rights of mortgagee.
(4) Sale in execution of decree-Immoveable property.
(5) Special or second appeal.
(6) Relinquishment or omission to sue for portion of claim.

--O 21 r 70—Proclamation of sales by Public auction. **See** C P C (1908) O 21 r 66. Case No (2573). **12 W R 488.**

—O 21 r 70—Proceedings under s. 287 Ministerial not judicial. **See C P C** (1908) O 21 r 66. Case No (2574) **14 M L J 57.**

- O 21 r 70—Property ordered to be sold the occupancy holding of judgment debtor. **See** C P C (1908) O 21 r 66 .Case No (2579) **2 A L J 401.**

--O 21 r 70--Sale-proclamation statement of value **See** C P C (1908) O 21 r 66 Case No (2578). **8 C W N 264 : 31 Cal 922.**

—O 21 r 70—Sale-proclamation—Statement of value. **See** C P C (1908) O 21 r 66 Case No (2577) **[illegible] C W N 257.**

—O 21 r 70 —Sale-proclamation—Statement of value **See** C P C (1908) O 21 r 66 Case No (2576). **12 C WN 542.**

—O 21 r 70--Notification of sale—Contents **See** C P C O 21 r 66 (2). Case No (2575) **A W N (1877) 50.**

—O 21 r 70—Finality of decision of executing court as to property being non-ancestral **See** C P C (1908) S. 47. Case No. 798. **28 All 273.**

-O 21 r 70-Execution of decree-Incumbrances by third parties--S. 287 applies & not S. 244—therefore no appeal. **See** C P C (1908) S 47. Case No (550) **1894 P J 48**

--O 21 r 70--Application for amendment of sale proclamation—Appeal. **See** C P C (1908) S 47. Case No (513) **6 Ind Cas 180.**

C P C O 21 r 71=S 293 of 1882.

Defaulting purchaser answerable for loss on re-sale.

Notes.—This rule corresponds to section 293 C P Code, 1882, with some additions and alterations. The words "*or to the Collector or subordinate of the Collector as the case may be*" have been added after the words "certified to the Court." The other changes are of a merely verbal character.

C P C (1908) O 21 r 71=(1882,S. 293) -Concld.

See Cases under:—

(1) Sale in Execution of Decree—Re-sales.
(2) Appeal—Sale in execution of decree.

2587--C P C O 21 rr 71, 84, 86=(1882 Ss 293 306. 308)—Re-sale—High Court, General Rules and Circular Orders (Civil), Chap v Rules 5, 6 – Poundage fee.

A decree-holder bid for the property at an auction sale and it was knocked down to him for Rs. 1,113. He failed to pay the poundage fee as laid down in Rules 5 and 6 of the High Court's Rules and Circular Orders and the property was put up for sale again, when he again purchased it for Rs. 700.

Held, Section 293 of the Code applied and not sections 306, 308, and the difference was caused by the purchaser's default. **Madhu Sudan Das v Purna Chandra Chowdhuri. 9 C L J 115=3 Ind Cas 886.**

2588—C P C O 21 rr 71, 84=(1882 Ss. 293, 306,) 25 per cent not paid immediately on sale, effect of.

When a purchaser of property at a court sale fails to deposit the 25 per cent of the purchase money, immediately after the sale, it is not only irregular but it is no sale at all, and the decree-holder is not justified in claiming the differences of prices between the first and second sales. (5 All 316 Fol) **Amir Begam v The Bank of Upper India Ld. 5 A L J 336=A W N (1908) 107=30 All 273.**

2589—C P C O 21 rr 71, 84 (1)—Ss 293,306—Re-sale—No bidder.

If in the case of a re-sale, under S. 306 nobody bids for it, there is no re sale and therefore the provision of S. 293 of the Civil Procedure Code cannot be put into force and the highest bid at the first sale cannot be considered a deficiency recoverable under that section. **Hiralal v Gangi 1886 P J 263.**

—O 21 r 71—See C P C (1908) S. 2 cl 2 Case No (31) **A W N (1890) 85.**

C P C (1908 O 21 r 72=S. 294 of 1882

Notes-This rule corresponds to section 294, C. P. Code, with some modifications. The words "*subject to the provisions of s. 73*" have been added after the word "may" in sub rule (2); the words "if he so desires" which occurred in the old section, have been omitted as unnecessary, as the word *may* itself conveys the same meaning. The other changes are merely of a verbal character. The above addition has been made adopting the principle laid down in 6 Bom. 570; 11 Mad. 336 and 6 Mad. 123.

(1) Decree-holder, not to bid for or buy property without permission 2590-2594.

(2) Decree-holder buying without permission 2595-2598.

See Cases under

(1) Sale in Execution of Decree—Setting aside Sale—Irregularity.

(2) Invalid Sales—Fraud.

(3) Setting Aside Sale—Irregularity.

(1) Decree-holders not to bid for or buy property without permission.

2590—C P C—O. 21, r. 72=S.294—Purchase by undivided brother of decree-holder.

A purchase at an execution sale by an undivided brother of the decree-holder is not void under S 294 unless the purchase was for the joint benefit of the decree-holder and himself, and this will depend on whether the purchase was made with joint funds, the presumption being that the funds were joint **Annapa v Jivai. 1884. P J.. 74.**

2591—C P C O. 21, r 72=(1882 S. 294)-Leave to bid—Mortgage decree-holder's right to set off.

The first paragraph of S. 294 requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permisson to bid is granted that there should not be this right of set off.

Gangaram v Nagindas. 32 Bom 381= 10 Bom L R 519

2592—C P C—O. 21, r. 72=(1882 S. 294)—Decree—Execution-Auction sale—Decree bolder bidding for property with permission of Court—Right to set off.

C P C (1908) O 21 r 72=(1882, S 294) -*Contd.*

(1) Decree-holder, not to bid or buy property without permission—*Contd.*

The first paragraph of S 294 of the Civil Procedure Code (Act XIV of 1883) requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off in such a case, no set off can be allowed. **Hazarimal Fakirchand v Namdev Rakhmaji. 10 Bom L R 296=32 Bom 379.**

2593—C P C—O. 21, r. 72=S 294—Sale in execution of decree - Decree-holder—Purchase-money, deposit of balance of—Decree-holder, application by, to have balance of purchase-money set-off against amount of decree—Forfeiture of deposit not made within 15 days.

The decree-holder having obtained permission to purchase property attached in execution of his decree, and having purchased it, and having deposited 25 per cent of the price, failed to pay the balance of the price within 15 days as required by s. 307 of the Civil Procedure Code. Later on he applied that the balance of the purchase-money might be set off against the amount due under s. 294, Civil Procedure Code. The application not having been presented within 15 days from the date of sale the Court set aside the sale and directed that the 25 per cent of the purchase money, which had been paid, should be forfeited. *Held*, that it was not necessary that the application under s. 294, Civil Procedure Code, should be made within 15 days from the date of sale, and the reason for the provision in s. 307 of the Code does not exist in cases where the decree-holders are the purchasers. *Held*, therefore, that as the decree-holder applied to have the balance of the purchase money set off against the amount due under his decree, the application should have been allowed and the deposit should not have been forfeited. **Badamo v Sarju Parshad 3 O. C 240.**

2594—C P C O 21, r 72=(1882 S. 294) —Execution sale application to set aside—Fraud—Irregularity - Code of C P (XIV of 1882) Ss. 244, 294 and 311—Purchase by the decree-holder benami at a price less than at which the decree-holder was permitted to bid—Limitation Act (XV of 1877) sch. II Art 178.

C P C (1908) O 21 r 72=(1882,S.294) —*Contd.*

(1) Decree-holder, not to bid or buy property without permission—*Concld.*

The purchase of a property at an execution sale by the decree-holder, in the name of another person at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale. (10 Cal 757 Ref: to) Art. 178, Sch II of the Limitation Act would govern such a case. **Srimati Sarat Kumari v Naimi Charn Dey,** **5 C W N 265.**

Notes:—Ref: 32 Mad 242.

(2) Decree-holder buying without permission.

2595—C P C—O. 21, r. 72=(1882 S. 294)—Decree-holder bidding without Court's permission—Sale voidable, not void.

A purchase by the decree-holder, without permission of the Court, is not *ipso facto* void, but is valid until set aside under S. 294 of the Code. (10 Cal. 757, *Dist*) **Moti Lal Adhikari v Ramdoyal Das.** **1 Ind Cas 645.**

2596—C P C—O. 21, r. 72 (294)—Purchase by decree-holder without permission not void but only voidable.

A purchase by the decree-holder without permission is not void but only voidable. The section is not applicable to purchases made before its enactment. **Hari v Ramachandra.** **8 Bom L R 873.**

2597—C P C—O. 21, r. 72=S.294-Voidable.

A purchase in plaintiff's name but really for and on behalf of the judgment-creditor is not void, but is only voidable, on the application of the judgment-debtor or of some other person interested in the sale. **Lakshman v Shidu,** **1888, P J., 205.**

2598—O 21 r 72 S.73, O 21 r 92 S. 115=(1882 Ss. 294, 295, 312, 314, 622)—Person interested in setting aside sale—Limitation for application—Confirmation of sale—Purchase by Decree-holder without permission of Court—Limitation Act. Art. 166—The sons of a judgment debtor are not persons interested in the sale of ancestral property held in execution of a money decree against their father so as to be entitled to apply for setting aside the sale under s. 294. Persons entitled under s. 295 to reteable distribution in the assets realized by the sale may be entitled to apply s. 294 for setting aside the sale. An application to set aside the sale under s 294 must be made within 30 days from the date of the sale under Art. 166 of Sch. II of the Limitation Act. No sale can be confirmed under Ss. 312 and 314, C. P C and become absolute until the expiration of such 30 days. Where a sale held in October 1887, was set aside under s 294 C P C upon an application made by the sons of the judgment-debtor in June 1888 long after the expiry of the 30 days prescirbed by Art 166 of the Limitation Act, and long after the sale was confirmed, the High Court might when the order setting aside the sale came to its notice in a case between the sons of the judgment-debtor and the purchaser for recovery of possession, set aside the sale order under s. 622 C P C. A purchase made by the decree-holder without the permission of the Court is not void, but only voidable under s 294 C P C. When a sale is set aside under s. 294, C P C the judgment-debtor who has been benefited by the satisfaction of the decree in whole or in part must make restitution. The execution of the decree will be re-opened, the purchase-money if paid must be refunded to the purchaser, and the decree-holder will be held responsible for any deficiency in the price which may happen on the re-sale and for the expenses incidental thereto. When restitution is impracticable as where the decree-holder purchaser has sold property to a person who has purchased it *bona fide*, a sale cannot be set aside under s 294 at the instance of the judgment-debtor or of any person interested in the sale. **Marimuth Udaiyan v Subbaraya Pilai.** **13 M L J 231.**

C P C (1908) O 21 r 72=(1882, S.294) *Contd.*

(2) Decree-holder buying without permission—*Concld.*

—O 21 r 72—Execution on the ground that the real purchasers were the decree-holders who had not obtained leave to bid-Proper remedy. **See** C P C (1908) S. 47. Case No. (714). **23 All. 478.**

—O 21 r 72. Order cancelling an execution sale of land-Subsequent suit for possession brought by judgment-debtor. **See** C P C (1908) s. 47. Case No. (721) **16 Mad 287.**

—O 21 r 72.—Purchase by mortgage decree benami in contravention of conditions imposed by court—Fraudulent purchase **See** C P C (1908 S. 47. Case No 207. **32 Mad 242.**

—O 21 r 72—See C P C (1908) S 2 cl 14. Case No. (57) **15 C W N 862.**

—O 21 r 72 Purchase at execution sale by decree-holder-Leave to bid—Necessity for setting up fraud in pleadings-Setting aside of sale. **See** C P C (1908) S 47. Case No (437) **5 M L J 248.**

C P C (1903) O 21 r 72=(1882 S.294) -Concld.

—O 21 r 72–Judgment-creditor buying without court's permission-No separate suit by Judgment-debtor **See** C P C (1908) s 47 Case No (718) **1896 P J 398.**

C P C O 21 r 73=S.292 of 1882

Notes—This sule corrpesponds to section 292, C P Code, 1882, with some verbal alterations. The words "*or other person*" have been added after the word "officer;" and the words "at such sale which occurred in the last sentence of the old section after the words "the property sold," have been omitted, as unnecessary. The words "*other person*" which have been added, seem to include pleaders and muktears. *See 15 Mad 389 and 23 Cal 805.*

C P C O 21 r.75.

Sale of moveable property-Negotiable instruments & shares in Corporations,

Notes—This rule is new. The provisions of this rule are somewhat similar te sections 127 and 129 (2) of the Bengal Tenancy Act VIII of 1885

See Cases under:—

(1) Registration Act 1877 s 17 (1866, 1871 s. 17)
(2) Sale in execution of decree—Invalid sales—Decrees barred by limitation.
(3) Execution of decree.

O 21 r 76—Sales by whom conducted & how made. **See** C P C (1908) O 21 r 65. Case No (2572) **12 W R 238.**

C P C O 21 r 77=S 293.

Irregularity not to vitiale sale but any person injured may sue.

2599-2600-O 21 r 78 and s 47(=ss 298,244 C P C 1882)—Irregularity in conducting sale of moveable property—Injury—Suit for compensation—Questions for executing Court-Though s. 298, C P C 1882 allows a judgment-debtor to sue for compensation for injury caused to him on account of an irregularity in publishing or conducting the sale of moveable property that section must be read with s 244(s 47) which bars a separate suit regarding any question arising between the parties in execution. **Atma Ram v Gulab 14 P R 1886.**

Notes-Ref 3 P R 1899 Rev:Con.162 P R 1889.

C P C (1908) O 21 r 79.

Notes—This rule embodies the provisions contained in ss 299, 300 and 301 of the **C** P Code 1882, with some modifications.

In sub-rule (1), the words "negotiable instrument" which occurred in section 299 of the old Code, have been omitted: the other changes are mere verbal.

In sub-rule (2) the words "*in the possession of some person other than the judgment debtors,*" have been substituted for the words "to which the judgment-debtor is entitled subject to the possession of some other person," which occurred in section 300 of the old Code.

Sub-rule (3) is almost similar to section 301 of the C P Code, 1882, with some verbal changes only.

C P C O 21 r 79 (3)—Attachment of debt share etc. **See** C P C (1908) O 21 r 46 (1). Case No. (2511). **27 Mad 67.**

—O 21 r 79—(3)—Evidence to be adduced by claimant. **Se** C P C (1908) O 21 r 59. Case No (2553). **27 Mad 67.**

C P C O 21 r 80=S. 302 of 1882

Notes—This rule corresponds to section 302 of the C P Code 1882, with some additions and alterations.

The important alterations are the additions of the words "*or such officer as he may appoint in this behalf;*" and of the words "*such execution or endorsement shall have the same effect as an execution or endorsement by the property,*" in sub-rule (1). The other changes introduced in this rule are of a verbal charactor.

2601—C P C O 21 rr 82 to 96=Ss 304 to 319. Ss 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property. **Krishnaji v Mahadev Vinayak. 25 Bom 104**

C P C O 21 r 83=S. 305 of 1882

Postponement of sale to enable judgment-debtor to raise amount of decree.

Notes—This rule corresponds to section 305, C. P. Code, 1882, with some important additions and alterations.

In sub-rule (1), the words "*on such terms*" have been added after the words 'order for sale.'

In the first proviso, the words "*but save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72,*" have been added.

C P C (1908) O 21 r 83=(1882,S.305) -*Contd.*

Sub-rule (3) is new. It has been added adopting the principles laid down in 3 Cal. 335; 1 C. L. R. 295 and 31 Cal. 373. On this point there was a difference of opinion between the Calcutta and Bombay High Courts, the latter holding that sections 304 to 319 of the C. P. Code of 1892, were applicable to all sales of immoveable property including sales under the T. P. Act (IV. of 1882). See 25 Bom. 104 and 26 Bom 379. This sub-rule (3) has set at rest the above conflicting rulings by adopting the principle laid down in the above Calcutta case and it has overridden the Bombay rulings.

2602-C P C O 21 r 83=(S.305)—Postponement of sale to enable judgment-debtor to raise decree amount—Mortgage of minor judgment-debtor's property—Sanction under S. 305 not enough by itself.

Sanction obtained under S. 305 C P. C., will not by itself relieve the guardian from the duty of obtaining the sanction of the District Judge under the Guardians and Wards Act before selling or mortgaging a minor judgment-debtor's property. **Sargu v District Judge of Benares. (1901) 9 C L J 491.**

2603—C P C (1908) O. 21, rr. 83, 89, 90, 92 (=ss. 305, 310-A, 311 and 312, Civ. Pro. Code, 1882)—Sale in execution of money-decree—Time given to the judgment-debtor to raise money by private alienation—Validity-Revision under S. 70, cl. (a) of Punjab Courts Act.

Where, after auction sale of immoveable property in execution of a money-decree, the judgment-debtor applied for time, under s. 305 of the Code, to enable him to raise the amount of the decree by mortgage of the property sold by auction, *held* that the executing Court had no power to grant the application under that section. The executing Court was bound, under the imperative provisions of s. 312, to pass an order confirming the sale, if the sale is not set aside before the expiry of the period of limitation prescribed for application under ss. 310-A and 311 of the Code. Where the lower appellate Court, in upsetting the order of execution of the lower Court, had acted upon a complete misapprehension of the powers of an executing Court, and wholly disregarded the imperative provisions of law, *held* that the irregularity warranted the interference of the Chief Court on revision, under s. 70, cl. (a) of the Punjab Courts Act. (24 Cal 682, 31 Cal 1011, Ref:) **Girdhari Lal v Bhago 92 P R 1907.**

C P C (1908) O 21 r 83=(1882 S.305) -*Concld.*

2604—C P C O 21 r 83 (=Civ. Pro. Code, 1877, s. 305, Proviso)—Private sale by judgment-debtor with Court's permission—Confirmation of sale—Rights of purchaser.

A private sale, by a judgment-debtor who had obtained permission of the Court under s. 305, Civ. Pro. Code, which had not been confirmed by the Court, did not convey to the vendor such title in the property as to entitle him to maintain a suit for possession of property against another similar vendee. **Sri Lal v Ballabh Shankar A W N 1882, 243.**

2604A—C P C (1908) O. 21, r. 83—Alienation by guardian—Sufficiency of permission obtained from executing Court under. **6 A L J 491=31 All 378=2 Ind Cas 356.**

2605—C P C O 21 r 83 (1) (2)—Mortgage-decree directing sale of immoveable property—Permission to pay by instalments.

Section 305 of the Civil Procedure Code does not apply to cases where under a mortgage decree, immoveable property mortgaged has been directed to be sold. **Narasimha Charlu v Pedda Ramayya 6 M L J 187.**

—O 21 r 83-See (1) Sale in execution of decree.
(2) C P C S. 47—parties.
(3) Mortgage—Sale of mortgaged property—Purchasers.

—C P C (1908) O 21 r 83—Private-Purchaser. **See**—C P C (1908). S. 47. Case No. 300. **23 All 116.**

—O 21 r 83—Alienation during attachment. **See**—C P C (1908) S. 64. Case No. (1019). **1 M L T 46=30 Bom 337.**

—O 21 r 83—Estoppel—Application to have the sale held and application to set the sale aside. **See**—C P C (1908) S. 47. Case No (814). **5 Ind Cas 489**

C P C O 21 r 24=S 306 of 1882

Deposit by purchaser and re-sale on default.

Notes—Sub-rule (1) of this rule corresponds to section 306, C P Code, 1882, with some modifications.

The words "under this chapter" which occurred in the old section after the words "immoveable property" have been omitted; the words "*or other person*" have been added after the words "to the officer;" and the word '*re sold*' has been substituted for the words "be put up again and sold" which occurred in the old section.

Sub-rule (2) is new, and it has been added to meet the case of 5 C L R 181, where it was held that decree-holder buying with permission and desiring to set off his purchase-money against the amount of the decree is not exempt from the necessity of making a deposit of 25 per cent. Under this sub-rule (2) the Court may dispense with the requirements of sub rule (1); where the decree-holder obtains permission to bid under rule 72.

"In rules 77 and 84 express reference has been made to a *re sale* so as to make it clear that the default mentioned in those rules will attract the consequence indicated in rule 71. In this connection reference may be made to. 7 Cal 337,

See Report of the Special Committee

See—Sale in Execution of Decree—Setting aside sale—Irregularity.

2606—C P C O 21 rr 84, 90=(1882 Ss.306, 311) —Execution of decree—Sale in execution—Non-payment of required portion of money at date of Sale—Irregularity.

Held, that, the fact an auction purchaser at a sale held in execution of a decree did not pay the 25 per cent of the purchase-money required by s. 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity, which would not affect the validity of the sale, unless it could be shown that substantial injury was thereby caused to the judgment-debtor. 5 All 316, declared to be no longer law. **Ahmad Bakhsh v Lalta Prasad A W N (1905) 263=28 All 238.**

2607—C P C O 21 r 84 (1882 s. 306)

Failure to deposit purchase money under effect of, on the sale in execution. Failure to make the immediate deposit required by s. 306 of the Code is not an indispensable condition for the validity of the sale but constitutes a mere irregularity in the conduct of it. The section itself distinctly refers to the purchaser as the person who should make the deposit and reference to him as purchaser implies that there has been a sale. If, however, the officer conducting the sale neglects to demand the deposit immediately and the purchaser does not pay it, and if the property is not put up again for sale, it ought to be held that there has nevertheless been a valid sale in execution of the decree, the failure to pay the deposit amounting only to an irregularity in conducting the sale. (5 All 316, 16 Cal 33; 14 Mad 237; 7 Cal 337; 5 Bom 575 Ref.) **Raman Chetty v S M R M Olagappa Chetty. 3 L B R 225.**

2608—C P C O 21 r 84, S. 66 (1882 s. 306 to 317)—Sale by auction—Suit by certified purchaser to set aside sale—Maintainability of suit—Sale vitiated by fraud and misrepresentation—Benami transactions—Right of Benamidar—Limitation Act (XV of 1877) Arts 95, 12, 120.

A benami transaction does not vest any title to an immoveable property in the benamidar and therefore such a person cannot maintain a suit which is based on title. A benamidar is not a trustee, for no legal estate vests in him. In this case the purchaser is only an agent of an undisclosed principal and not a benamidar. But sale of property by Court-auction is governed by special provisions of the Code and the acceptance of the bid by the Court-officer has the effect of a contract with such officer. The policy of the special provisions of the Code is to recognise the certificated purchaser as the proper person to seek to set aside a fraudulent sale.

A suit to set aside a fraudulent sale by a certificated purchaser is governed by art 95 of the Limitation Act. (35 Cal 551; 34 Cal 717; 30 Mad 245 Ref; 5 C L J 385 Fol.) **Shree Rajah Dalta Venkata Suryanarayana Jagapathiraju Bahadur Garu v Goluguri Bapiraju. 8 M L T 154.**

—O 21 r 84—Defaulting purchaser answerable for loss on re-sale.

See C P C (1908) O 21 r 71 Case No (2588) **5 A L J 336.**

—O 21 r 84—Deposit.

See C P C (1908) O 21 r 89 Case No (2649) **7 A L J 325.**

—O 21 r 84—Defaulting purchaser answerable for loss on re-sale.

See C P C (1908) O 21 r 71 Case No (2587) **9 C L J 115.**